

NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 203

16 MARCH 2010

4 MAY 2010

RALEIGH
2012

**CITE THIS VOLUME
203 N.C. APP.**

**This volume is printed on permanent, acid-free paper in compliance
with the North Carolina General Statutes.**

TABLE OF CONTENTS

Judges of the Court of Appeals	v
Superior Court Judges	vii
District Court Judges	xi
Attorney General	xviii
District Attorneys	xx
Public Defenders	xxi
Table of Cases Reported	xxii
Table of Cases Reported Without Published Opinions	xxiv
General Statutes Cited	xxvi
Rules of Civil Procedure Cited	xxvi
Rules of Evidence Cited	xxvii
Rules of Appellate Procedure Cited	xxvii
Opinions of the Court of Appeals	1-742
Amendments to the Rules and Regulations of the North Carolina Board of Law Examiners	745
Amendments to the North Carolina State Bar Rules of Professional Conduct	747
Amendments to the Rules and Regulations of the North Carolina State Bar Concerning Discipline and Disability of Attorneys	750
Amendments to the Rules and Regulations of the North Carolina State Bar Concerning Reinstatement	755

Amendments to the Rules and Regulations of the North Carolina State Bar Concerning Continuing Legal Education	757
Amendments to the Rules and Regulations of the North Carolina State Bar Concerning Legal Specialization	759
Amendments to the Rules and Regulations of the North Carolina State Bar Concerning Certification of Paralegals	765
Headnote Index	769
Word and Phrase Index	800

**THE COURT OF APPEALS
OF
NORTH CAROLINA**

Chief Judge

JOHN C. MARTIN

Judges

LINDA M. MCGEE

ROBERT C. HUNTER

WANDA G. BRYANT

ANN MARIE CALABRIA

RICHARD A. ELMORE

SANFORD L. STEELMAN, JR.

MARTHA GEER

LINDA STEPHENS

DONNA S. STROUD

ROBERT N. HUNTER, JR.

SAMUEL J. ERVIN IV

CHERI BEASLEY

CRESSIE H. THIGPEN, JR.

J. DOUGLAS McCULLOUGH

Emergency Recalled Judges

GERALD ARNOLD

JOHN B. LEWIS, JR.

DONALD L. SMITH

JOHN M. TYSON

RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD

SIDNEY S. EAGLES, JR.

Former Judges

WILLIAM E. GRAHAM, JR.

JAMES H. CARSON, JR.

J. PHIL CARLTON

BURLEY B. MITCHELL, JR.

HARRY C. MARTIN

E. MAURICE BRASWELL

WILLIS P. WHICHARD

DONALD L. SMITH

CHARLES L. BECTON

ALLYSON K. DUNCAN

SARAH PARKER

ELIZABETH G. McCRODDEN

ROBERT F. ORR

SYDNOR THOMPSON

JACK COZORT

MARK D. MARTIN

JOHN B. LEWIS, JR.

CLARENCE E. HORTON, JR.

JOSEPH R. JOHN, SR.

ROBERT H. EDMUNDS, JR.

JAMES C. FULLER

K. EDWARD GREENE

RALPH A. WALKER

HUGH B. CAMPBELL, JR.

ALBERT S. THOMAS, JR.

LORETTA COPELAND BIGGS

ALAN Z. THORNBURG

PATRICIA TIMMONS-GOODSON

ERIC L. LEVINSON

JOHN M. TYSON

JOHN S. ARROWOOD

JAMES A. WYNN, JR.

BARBARA A. JACKSON

Administrative Counsel
DANIEL M. HORNE, JR.

Clerk
JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys
John L. Kelly
Shelley Lucas Edwards
Bryan A. Meer
Alyssa M. Chen
Eugene H. Soar
Yolanda Lawrence
Matthew Wunsche
Nikiann Tarantino Gray

ADMINISTRATIVE OFFICE OF THE COURTS

Director
John W. Smith

Assistant Director
David F. Hoke

APPELLATE DIVISION REPORTER

H. James Hutcheson

ASSISTANT APPELLATE DIVISION REPORTERS

Kimberly Woodell Sieredzki
Allegra Collins

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
<i>First Division</i>		
1	JERRY R. TILLET	Manteo
	J. CARLTON COLE	Hertford
2	WAYLAND SERMONS	Washington
3A	W. RUSSELL DUKE, JR.	Greenville
	CLIFTON W. EVERETT, JR.	Greenville
6A	ALMA L. HINTON	Roanoke Rapids
6B	CY A. GRANT, SR.	Ahoskie
7A	QUENTIN T. SUMNER	Rocky Mount
7BC	MILTON F. (TOBY) FITCH, JR.	Wilson
	WALTER H. GODWIN, JR.	Tarboro
<i>Second Division</i>		
3B	BENJAMIN G. ALFORD	New Bern
	KENNETH F. CROW	New Bern
	JOHN E. NOBLES, JR.	Morehead City
4A	W. DOUGLAS PARSONS	Clinton
4B	CHARLES H. HENRY	Jacksonville
5	W. ALLEN COBB, JR.	Wrightsville Beach
	JAY D. HOCKENBURY	Wilmington
	PHYLLIS M. GORHAM	Wilmington
8A	PAUL L. JONES	Kinston
8B	ARNOLD O. JONES II	Goldsboro
<i>Third Division</i>		
9	ROBERT H. HOBGOOD	Louisburg
	HENRY W. HIGHT, JR.	Henderson
9A	W. OSMOND SMITH III	Semora
10	DONALD W. STEPHENS	Raleigh
	ABRAHAM P. JONES	Raleigh
	HOWARD E. MANNING, JR.	Raleigh
	MICHAEL R. MORGAN	Raleigh
	PAUL C. GESSNER	Wake Forest
	PAUL C. RIDGEWAY	Raleigh
14	ORLANDO F. HUDSON, JR.	Durham
	ELAINE BUSHFAN	Durham
	MICHAEL O'FOGHLUDHA	Durham
	JAMES E. HARDIN, JR.	Hillsborough
15A	ROBERT F. JOHNSON	Burlington
	WAYNE ABERNATHY	Burlington

DISTRICT	JUDGES	ADDRESS
15B	CARL R. FOX R. ALLEN BADDOUR	Chapel Hill Chapel Hill
<i>Fourth Division</i>		
11A	C. WINSTON GILCHRIST	Buies Creek
11B	THOMAS H. LOCK	Smithfield
12	CLAIRE HILL	Fayetteville
12B	GREGORY A. WEEKS	Fayetteville
12C	JAMES F. AMMONS, JR. MARY ANN TALLY	Fayetteville Fayetteville
13A	DOUGLAS B. SASSER	Hallsboro
13B	OLA M. LEWIS	Southport
16A	RICHARD T. BROWN	Laurinburg
16B	ROBERT F. FLOYD, JR. JAMES GREGORY BELL	Fairmont Lumberton
<i>Fifth Division</i>		
17A	EDWIN GRAVES WILSON, JR. RICHARD W. STONE	Eden Eden
17B	A. MOSES MASSEY ANDY CROMER	Mt. Airy King
18	LINDSAY R. DAVIS, JR. JOHN O. CRAIG III R. STUART ALBRIGHT PATRICE A. HINNANT JOSEPH E. TURNER	Greensboro High Point Greensboro Greensboro Greensboro
19B	VANCE BRADFORD LONG	Asheboro
19D	JAMES M. WEBB	Whispering Pines
21	JUDSON D. DERAMUS, JR. WILLIAM Z. WOOD, JR. L. TODD BURKE RONALD E. SPIVEY	Winston-Salem Troutman Winston-Salem Winston-Salem
23	EDGAR B. GREGORY	Wilkesboro
<i>Sixth Division</i>		
19A	W. ERWIN SPAINHOUR	Concord
19C	ANNA MILLS WAGONER	Salisbury
20A	TANYA T. WALLACE KEVIN M. BRIDGES	Rockingham Oakboro
20B	W. DAVID LEE CHRISTOPHER W. BRAGG	Monroe Monroe
22A	JOSEPH CROSSWHITE ALEXANDER MENDALOFF III	Statesville Statesville
22B	MARK E. KLASS THEODORE S. ROYSTER, JR.	Lexington Lexington
<i>Seventh Division</i>		
25A	BEVERLY T. BEAL ROBERT C. ERVIN	Lenoir Morganton
25B	TIMOTHY S. KINCAID	Newton

DISTRICT	JUDGES	ADDRESS
26	NATHANIEL J. POOVEY	Newton
	RICHARD D. BONER	Charlotte
	W. ROBERT BELL	Charlotte
	YVONNE MIMS EVANS	Charlotte
	LINWOOD O. FOUST	Charlotte
	ERIC L. LEVINSON	Charlotte
	H. WILLIAM CONSTANGY	Charlotte
27A	HUGH LEWIS	Charlotte
	JESSE B. CALDWELL III	Gastonia
27B	ROBERT T. SUMNER	Gastonia
	FORREST DONALD BRIDGES	Shelby
	JAMES W. MORGAN	Shelby

Eighth Division

24	CHARLES PHILLIP GINN	Boone
	GARY GAVENUS	Boone
28	ALAN Z. THORNBURG	Asheville
	MARVIN POPE	Asheville
29A	LAURA J. BRIDGES	Rutherfordton
29B	MARK E. POWELL	Hendersonville
30A	JAMES U. DOWNS	Franklin
30B	BRADLEY B. LETTS	Sylva

SPECIAL JUDGES

SHARON T. BARRETT	Asheville
MARVIN K. BLOUNT	Greenville
CRAIG CROOM	Raleigh
RICHARD L. DOUGHTON	Sparta
JAMES L. GALE	Greensboro
A. ROBINSON HASSELL	Greensboro
D. JACK HOOKS, JR.	Whiteville
LUCY NOBLE INMAN	Raleigh
JACK W. JENKINS	Morehead City
JOHN R. JOLLY, JR.	Raleigh
SHANNON R. JOSEPH	Raleigh
CALVIN MURPHY	Charlotte
WILLIAM R. PITTMAN	Raleigh
GARY E. TRAWICK, JR.	Burgaw

EMERGENCY JUDGES

W. DOUGLAS ALBRIGHT	Greensboro
STEVE A. BALOG	Burlington
MICHAEL E. BEALE	Rockingham
HENRY V. BARNETTE, JR.	Raleigh
STAFFORD G. BULLOCK	Raleigh

DISTRICT	JUDGES	ADDRESS
	C. PRESTON CORNELIUS	Mooreville
	B. CRAIG ELLIS	Laurinburg
	ERNEST B. FULLWOOD	Wilmington
	THOMAS D. HAIGWOOD	Greenville
	CLARENCE E. HORTON, JR.	Kannapolis
	CHARLES C. LAMM, JR.	Terrell
	RUSSELL J. LANIER, JR.	Wallace
	JERRY CASH MARTIN	Mt. Airy
	J. RICHARD PARKER	Manteo
	RONALD L. STEPHENS	Durham
	KENNETH C. TITUS	Durham
	JACK A. THOMPSON	Fayetteville
	JOHN M. TYSON	Fayetteville
	GEORGE L. WAINWRIGHT	Morehead City
	DENNIS WINNER	Asheville

RETIRED/RECALLED JUDGES

J. B. ALLEN	Burlington
ANTHONY M. BRANNON	Durham
FRANK R. BROWN	Tarboro
JAMES C. DAVIS	Concord
LARRY G. FORD	Salisbury
MARVIN K. GRAY	Charlotte
ZORO J. GUICE, JR.	Hendersonville
KNOX V. JENKINS	Four Oaks
JOHN B. LEWIS, JR.	Farmville
ROBERT D. LEWIS	Asheville
JULIUS A. ROUSSEAU, JR.	Wilkesboro
THOMAS W. SEAY	Spencer
RALPH A. WALKER, JR.	Raleigh

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. CHRISTOPHER BEAN (Chief) EDGAR L. BARNES AMBER DAVIS EULA E. REID ROBERT P. TRIVETTE	Edenton Manteo Wanchese Elizabeth City Kitty Hawk
2	MICHAEL A. PAUL (Chief) REGINA ROGERS PARKER CHRISTOPHER B. McLENDON DARRELL B. CAYTON, JR.	Washington Williamston Williamston Washington
3A	DAVID A. LEECH (Chief) PATRICIA GWYNETT HILBURN JOSEPH A. BLICK, JR. G. GALEN BRADDDY CHARLES M. VINCENT	Greenville Greenville Greenville Greenville Greenville
3B	CHERYL LYNN SPENCER PAUL M. QUINN KAREN A. ALEXANDER PETER MACK, JR. L. WALTER MILLS KIRBY SMITH, II	New Bern Morehead City New Bern New Bern New Bern New Bern
4	LEONARD W. THAGARD (Chief) PAUL A. HARDISON WILLIAM M. CAMERON III LOUIS F. FOY, JR. SARAH COWEN SEATON CAROL JONES WILSON HENRY L. STEVENS IV JAMES L. MOORE, JR.	Clinton Jacksonville Richlands Pollocksville Jacksonville Kenansville Kenansville Jacksonville
5	J. H. CORPENING II (Chief) REBECCA W. BLACKMORE JAMES H. FAISON III SANDRA CRINER RICHARD RUSSELL DAVIS MELINDA HAYNIE CROUCH JEFFREY EVAN NOECKER CHAD HOGSTON ROBIN W. ROBINSON	Wilmington Wilmington Wilmington Wilmington Wilmington Wilmington Wilmington Wilmington Wilmington
6A	BRENDA G. BRANCH (Chief) W. TURNER STEPHENSON III TERESA R. FREEMAN	Halifax Halifax Enfield
6B	THOMAS R. J. NEWBERN (Chief) WILLIAM ROBERT LEWIS II THOMAS L. JONES	Aulander Winton Murfreesboro
7	WILLIAM CHARLES FARRIS (Chief) JOSEPH JOHN HARPER, JR. JOHN M. BRITT PELL C. COOPER WILLIAM G. STEWART JOHN J. COVOLO ANTHONY W. BROWN	Wilson Tarboro Tarboro Tarboro Wilson Rocky Mount Rocky Mount
8	DAVID B. BRANTLEY (Chief)	Goldsboro

DISTRICT	JUDGES	ADDRESS
9	LONNIE W. CARRAWAY	Goldsboro
	R. LESLIE TURNER	Kinston
	TIMOTHY I. FINAN	Goldsboro
	ELIZABETH A. HEATH	Kinston
	CHARLES P. GAYLOR III	Goldsboro
	DANIEL FREDERICK FINCH (Chief)	Oxford
	J. HENRY BANKS	Henderson
	JOHN W. DAVIS	Louisburg
	RANDOLPH BASKERVILLE	Warrenton
9A	S. QUON BRIDGES	Oxford
	CAROLYN J. YANCEY	Henderson
	MARK E. GALLOWAY (Chief)	Roxboro
10	L. MICHAEL GENTRY	Pelham
	ROBERT BLACKWELL RADER (Chief)	Raleigh
	JAMES R. FULLWOOD	Raleigh
	JENNIFER M. GREEN	Raleigh
	MONICA M. BOUSMAN	Raleigh
	JENNIFER JANE KNOX	Raleigh
	DEBRA ANN SMITH SASSER	Raleigh
	VINSTON M. ROZIER, JR.	Raleigh
	LORI G. CHRISTIAN	Raleigh
	CHRISTINE M. WALCZYK	Raleigh
	ERIC CRAIG CHASSE	Raleigh
	NED WILSON MANGUM	Raleigh
	JACQUELINE L. BREWER	Apex
	ANNA ELENA WORLEY	Raleigh
	MARGARET EAGLES	Raleigh
	KEITH O. GREGORY	Raleigh
	MICHAEL J. DENNING	Raleigh
	KRIS D. BAILEY	Cary
	ERIN M. GRABER	Raleigh
	ALBERT A. CORBETT, JR. (Chief)	Smithfield
	JACQUELYN L. LEE	Smithfield
	JIMMY L. LOVE, JR.	Sanford
11	O. HENRY WILLIS, JR.	Lillington
	ADDIE M. HARRIS-RAWLS	Smithfield
	RESSON O. FAIRCLOTH II	Lillington
	ROBERT W. BRYANT, JR.	Smithfield
	R. DALE STUBBS	Smithfield
	CHARLES PATRICK BULLOCK	Lillington
	PAUL A. HOLCOMBE	Smithfield
	CHARLES WINSTON GILCHRIST	Lillington
	CARON H. STEWART	Smithfield
	A. ELIZABETH KEEVER (Chief)	Fayetteville
	ROBERT J. STIEHL III	Fayetteville
12	EDWARD A. PONE	Fayetteville
	KIMBRELL KELLY TUCKER	Fayetteville
	JOHN W. DICKSON	Fayetteville
	TALMAGE BAGGETT	Fayetteville
	GEORGE J. FRANKS	Fayetteville
	DAVID H. HASTY	Fayetteville
	LAURA A. DEVAN	Fayetteville

DISTRICT	JUDGES	ADDRESS
13	TONI S. KING	Fayetteville
	JERRY A. JOLLY (Chief)	Tabor City
	NAPOLEON B. BAREFOOT, JR.	Supply
	MARION R. WARREN	Exum
	WILLIAM F. FAIRLEY	Southport
14	SCOTT USSERY	Whiteville
	SHERRY D. TYLER	Whiteville
	MARCIA H. MOREY (Chief)	Durham
	JAMES T. HILL	Durham
	NANCY E. GORDON	Durham
	WILLIAM ANDREW MARSH III	Durham
	BRIAN C. WILKS	Durham
	PAT EVANS	Durham
	DORETTA WALKER	Durham
15A	JAMES K. ROBERSON (Chief)	Graham
	BRADLEY REID ALLEN, SR.	Graham
	KATHRYN W. OVERBY	Graham
	DAVID THOMAS LAMBETH, JR.	Graham
15B	JOSEPH M. BUCKNER (Chief)	Hillsborough
	CHARLES T. ANDERSON	Hillsborough
	BEVERLY A. SCARLETT	Hillsborough
	LUNSFORD LONG	Chapel Hill
16A	JAMES T. BRYAN	Hillsborough
	WILLIAM G. McILWAIN (Chief)	Wagram
	REGINA M. JOE	Raeford
16B	JOHN H. HORNE, JR.	Laurinburg
	J. STANLEY CARMICAL (Chief)	Lumberton
	HERBERT L. RICHARDSON	Lumberton
	JOHN B. CARTER, JR.	Lumberton
	JUDITH MILSAP DANIELS	Lumberton
17A	WILLIAM J. MOORE	Pembroke
	FREDRICK B. WILKINS, JR. (Chief)	Wentworth
	STANLEY L. ALLEN	Wentworth
	JAMES A. GROGAN	Wentworth
17B	CHARLES MITCHELL NEAVES, JR. (Chief)	Elkin
	SPENCER GRAY KEY, JR.	Elkin
	ANGELA B. PUCKETT	Elkin
	WILLIAM F. SOUTHERN III	Elkin
18	WENDY M. ENOCHS (Chief)	Greensboro
	SUSAN ELIZABETH BRAY	Greensboro
	H. THOMAS JARRELL, JR.	High Point
	SUSAN R. BURCH	High Point
	THERESA H. VINCENT	Greensboro
	WILLIAM K. HUNTER	High Point
	SHERRY FOWLER ALLOWAY	Greensboro
	POLLY D. SIZEMORE	Greensboro
	KIMBERLY MICHELLE FLETCHER	Greensboro
	BETTY J. BROWN	Greensboro
	ANGELA C. FOSTER	Greensboro
	AVERY MICHELLE CRUMP	Greensboro
	JAN H. SAMET	Greensboro
	ANGELA B. FOX	Greensboro
19A	WILLIAM G. HAMBY, JR. (Chief)	Kannapolis

DISTRICT	JUDGES	ADDRESS
19B	DONNA G. HEDGEPEETH JOHNSON	Concord
	MARTIN B. MCGEE	Concord
	BRENT CLONINGER	Mount Pleasant
	MICHAEL A. SABISTON (Chief)	Troy
	JAMES P. HILL, JR.	Asheboro
	JAYRENE RUSSELL MANESS	Carthage
	LEE W. GAVIN	Asheboro
	SCOTT C. ETHERIDGE	Asheboro
	DONALD W. CREED, JR.	Southern Pines
	ROBERT M. WILKINS	Asheboro
19C	CHARLES E. BROWN (Chief)	Salisbury
	BETH SPENCER DIXON	Salisbury
	WILLIAM C. KLUTTZ, JR.	Salisbury
	KEVIN G. EDDINGER	Salisbury
20A	ROY MARSHALL BICKETT, JR.	Salisbury
	LISA D. THACKER (Chief)	Polkton
	SCOTT T. BREWER	Monroe
	AMANDA L. WILSON	Rockingham
20B	WILLIAM TUCKER	Albemarle
	N. HUNT GWYN (Chief)	Monroe
	JOSEPH J. WILLIAMS	Monroe
	WILLIAM F. HELMS	Matthews
21	STEPHEN V. HIGDON	Monroe
	WILLIAM B. REINGOLD (Chief)	Clemmons
	CHESTER C. DAVIS	Winston-Salem
	WILLIAM THOMAS GRAHAM, JR.	Kernersville
	VICTORIA LANE ROEMER	Winston-Salem
	LAURIE L. HUTCHINS	Winston-Salem
	LISA V. L. MENEFEE	Winston-Salem
	LAWRENCE J. FINE	Winston-Salem
	DENISE S. HARTSFIELD	Clemmons
	GEORGE BEDSWORTH	Winston-Salem
22A	CAMILLE D. BANKS-PAYNE	Winston-Salem
	L. DALE GRAHAM (Chief)	Taylorsville
	H. THOMAS CHURCH	Statesville
	DEBORAH BROWN	Mooresville
	EDWARD L. HENDRICK IV	Taylorsville
	CHRISTINE UNDERWOOD	Olin
22B	WAYNE L. MICHAEL (Chief)	Lexington
	JIMMY L. MYERS	Advance
	APRIL C. WOOD	Lexington
	MARY F. COVINGTON	Thomasville
	CARLTON TERRY	Advance
	J. RODWELL PENRY	Lexington
	MITCHELL L. MCLEAN (Chief)	Wilkesboro
23	DAVID V. BYRD	Wilkesboro
	JEANIE REAVIS HOUSTON	Yadkinville
24	MICHAEL D. DUNCAN	Wilkesboro
	WILLIAM A. LEAVELL III	Bakersville
	R. GREGORY HORNE	Boone
	THEODORE WRIGHT MCENTIRE	Spruce Pine
25	F. WARREN HUGHES	Burnsville
	ROBERT M. BRADY (Chief)	Lenoir

DISTRICT	JUDGES	ADDRESS
26	GREGORY R. HAYES	Hickory
	L. SUZANNE OWSLEY	Hickory
	C. THOMAS EDWARDS	Morganton
	BUFORD A. CHERRY	Hickory
	SHERRIE WILSON ELLIOTT	Newton
	AMY R. SIGMON	Conover
	J. GARY DELLINGER	Morganton
	ROBERT A. MULLINAX, JR.	Newton
	LISA C. BELL (Chief)	Charlotte
	RICKYE MCKOY-MITCHELL	Charlotte
	LOUIS A. TROSCH, JR.	Charlotte
	REGAN A. MILLER	Charlotte
	BECKY THORNE TIN	Charlotte
	THOMAS MOORE, JR.	Charlotte
	CHRISTY TOWNLEY MANN	Charlotte
	RONALD C. CHAPMAN	Charlotte
	DONNIE HOOVER	Charlotte
	PAIGE B. McTHENIA	Charlotte
	JENA P. CULLER	Charlotte
	KIMBERLY Y. BEST-STATON	Charlotte
	CHARLOTTE BROWN-WILLIAMS	Charlotte
	JOHN TOTTEN	Charlotte
	ELIZABETH THORNTON TROSCH	Charlotte
	THEOFANIS X. NIXON	Charlotte
	KAREN EADY-WILLIAMS	Charlotte
	DONALD CURETON, JR.	Charlotte
	SEAN SMITH	Charlotte
	MATT OSMAN	Charlotte
27A	TYYAWDI M. HANDS	Charlotte
	RALPH C. GINGLES, JR. (Chief)	Gastonia
	ANGELA G. HOYLE	Belmont
	JOHN K. GREENLEE	Gastonia
	JAMES A. JACKSON	Gastonia
	THOMAS GREGORY TAYLOR	Belmont
	MICHAEL K. LANDS	Gastonia
	RICHARD ABERNETHY	Gastonia
27B	LARRY JAMES WILSON (Chief)	Shelby
	ANNA F. FOSTER	Shelby
	K. DEAN BLACK	Denver
	ALI B. PAKSOY, JR.	Shelby
	MEREDITH A. SHUFORD	Lincolnton
28	J. CALVIN HILL (Chief)	Asheville
	REBECCA B. KNIGHT	Asheville
	PATRICIA KAUFMANN YOUNG	Asheville
	JULIE M. KEPPEL	Asheville
	WARD D. SCOTT	Asheville
	EDWIN D. CLONTZ	Asheville
	ANDREA DRAY	Asheville
29A	C. RANDY POOL (Chief)	Marion
	LAURA ANNE POWELL	Rutherfordton
29B	J. THOMAS DAVIS	Forest City
	ATHENA F. BROOKS (Chief)	Fletcher
	DAVID KENNEDY FOX	Hendersonville

DISTRICT	JUDGES	ADDRESS
30	THOMAS M. BRITTAIN, JR.	Mills River
	PETER KNIGHT	Hendersonville
	RICHLYN D. HOLT (Chief)	Waynesville
	MONICA HAYES LESLIE	Waynesville
	RICHARD K. WALKER	Hayesville
	DONNA FORGA	Clyde
	ROY WJEWICKRAMA	Waynesville
	KRISTINA L. EARWOOD	Waynesville

EMERGENCY DISTRICT COURT JUDGES

THOMAS V. ALDRIDGE, JR.	Ocean Isle Beach
KYLE D. AUSTIN	Pineola
SARAH P. BAILEY	Rocky Mount
GRAFTON G. BEAMAN	Elizabeth City
SAMUEL CATHEY	Charlotte
SHELLY H. DESVOUGES	St. Augustine, FL
M. PATRICIA DEVINE	Hillsborough
J. KEATON FONVIELLE	Shelby
THOMAS G. FOSTER, JR.	Pleasant Green
EARL J. FOWLER, JR.	Asheville
JANE POWELL GRAY	Raleigh
SAMUEL G. GRIMES	Washington
JOYCE A. HAMILTON	Raleigh
LAWRENCE HAMMOND, JR.	Asheboro
JANE V. HARPER	Charlotte
ROBERT E. HODGES	Nebo
SHELLY S. HOLT	Wilmington
JAMES M. HONEYCUTT	Lexington
WAYNE G. KIMBLE	Jacksonville
DAVID Q. LABARRE	Durham
WILLIAM C. LAWTON	Raleigh
HAROLD PAUL MCCOY, JR.	Scotland Neck
LAWRENCE MCSWAIN	Greensboro
FRITZ Y. MERCER, JR.	Summerfield
NANCY C. PHILLIPS	Elizabethtown
DENNIS J. REDWING	Gastonia
ANNE B. SALISBURY	Cary
J. LARRY SENTER	Raleigh
JOSEPH E. SETZER, JR.	Franklinton
RUSSELL SHERRILL III	Raleigh
CATHERINE C. STEVENS	Chapel Hill
J. KENT WASHBURN	Burlington
CHARLES W. WILKINSON, JR.	Oxford

DISTRICT**JUDGES****ADDRESS****RETIRED/RECALLED JUDGES**

CLAUDE W. ALLEN, JR.	Oxford
DONALD L. BOONE	High Point
JOYCE A. BROWN	Supply
HUGH B. CAMPBELL	Charlotte
T. YATES DOBSON, JR.	Smithfield
JAMES W. HARDISON	Williamston
JANE V. HARPER	Charlotte
JAMES A. HARRILL, JR.	Winston-Salem
ROLAND H. HAYES	Gastonia
PHILIP F. HOWERTON, JR.	Charlotte
LILLIAN B. JORDAN	Randleman
JAMES E. MARTIN	Greenville
EDWARD H. MCCORMICK	Lillington
J. BRUCE MORTON	Greensboro
OTIS M. OLIVER	Dobson
STANLEY PEELE	Chapel Hill
MARGARET L. SHARPE	Greensboro
SAMUEL M. TATE	Morganton
JOHN L. WHITLEY	Wilson

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

ROY COOPER

Chief of Staff

KRISTI HYMAN

General Counsel

J. B. KELLY

Chief Deputy Attorney General

GRAYSON G. KELLEY

Deputy Chief of Staff

NELS ROSELAND

Senior Policy Advisor

JULIA WHITE

Solicitor General

JOHN F. MADDREY

Senior Deputy Attorneys General

JAMES J. COMAN

ROBERT T. HARGETT

ROBIN P. PENDERGRAFT

JAMES C. GULICK

WILLIAM P. HART

THOMAS J. ZIKO

REGINALD L. WATKINS

KEVIN L. ANDERSON

Special Deputy Attorneys General

DANIEL D. ADDISON

DAVID J. ADINOLFI II

STEVEN M. ARBOGAST

JOHN J. ALDRIDGE III

HAL F. ASKINS

JONATHAN P. BABB

GRADY L. BALENTINE, JR.

VALERIE L. BATEMAN

MARC D. BERNSTEIN

AMY L. BIRCHER

DAVID W. BOONE

WILLIAM H. BORDEN

HAROLD D. BOWMAN

DAVID P. BRENSKILLE

ANNE J. BROWN

MABEL Y. BULLOCK

SONYA M. CALLOWAY-DURHAM

JILL LEDFORD CHEEK

LEONIDAS CHESTNUT

KATHRYN J. COOPER

FRANCIS W. CRAWLEY

ROBERT M. CURRAN

NEIL C. DALTON

LEONARD DODD

DAVID B. EFIRD

JUNE S. FERRELL

JOSEPH FINARELLI

VIRGINIA L. FULLER

GARY R. GOVERT

RICHARD L. HARRISON

JENNIE W. HAUSER

TRACY J. HAYES

E. BURKE HAYWOOD

JOSEPH E. HERRIN

ISHAM FAISON HICKS

TINA L. HLABSE

KAY MILLER-HOBART

J. ALLEN JERNIGAN

DANIEL S. JOHNSON

FREEMAN E. KIRBY, JR.

TINA A. KRASNER

FREDERICK C. LAMAR

CELIA G. LATA

ROBERT M. LODGE

MARY L. LUCASSE

AMAR MAJMUNDAR

GAYL M. MANTHEI

ALANA MARQUIS-ELDER

ELIZABETH L. MCKAY

ROBERT C. MONTGOMERY

LARS F. NANCE

SUSAN K. NICHOLS

SHARON PATRICK-WILSON

ALEXANDER M. PETERS

DOROTHY A. POWERS

GERALD K. ROBBINS

BUREN R. SHIELDS III

RICHARD E. SLIPSKY

BELINDA A. SMITH

ELIZABETH N. STRICKLAND

DONALD R. TEETER

DOUGLAS P. THOREN

VANESSA N. TOTTEN

MELISSA L. TRIPPE

VICTORIA L. VOIGHT

SANDRA WALLACE-SMITH

JOHN H. WATTERS

KATHLEEN M. WAYLETT

JAMES A. WELLONS

PHILLIP K. WOODS

THOMAS M. WOODWARD

Assistant Attorneys General

STANLEY G. ABRAMS

RUFUS C. ALLEN

ALLISON A. ANGELL

STEVEN A. ARMSTRONG

ALESIA BALSHAKOVA

JOHN P. BARKLEY

SCOTT K. BEAVER

BRITNE BECKER

MICHAEL BERGER

BRIAN R. BERMAN

CAROLE BIGGERS

ERICA C. BING

KATHLEEN N. BOLTON

BARRY H. BLOCH

KAREN A. BLUM

TAMMY BOUCHELLE

RICHARD H. BRADFORD

LISA B. BRADLEY

STEPHANIE A. BRENNAN

CHRISTOPHER BROOKS

MATTHEW BOYATT

JILL A. BRYAN

MICHAEL BULLERI

BETHANY A. BURGON

HILDA BURNETTE-BAKER

KIMBERLY CALLAHAN

JASON T. CAMPBELL

STACY T. CARTER

LAUREN M. CLEMMONS

JOHN CONGLETON

SCOTT A. CONKLIN

LISA G. CORBETT

DOUGLAS W. CORKHILL

JILL CRAMER

ROBERT D. CROOM

LAURA E. CRUMPLER

Assistant Attorneys General—continued

LORA CUBBAGE	DURWIN P. JONES	CARRIE RANDA
KIMBERLY A. D'ARRUDA	CATHERINE F. JORDAN	ROBERT K. RANDLEMAN
CLARENCE J. DELFORGE III	LINDA J. KIMBELL	PETER A. REGULASKI
ADRIAN DELLINGER	ANNE E. KIRBY	PHILLIP T. REYNOLDS
TORREY DIXON	DAVID N. KIRKMAN	YVONNE B. RICCI
BRENDA EADDY	BRENT D. KIZIAH	CHARLENE B. RICHARDSON
LETTITIA C. ECHOLS	BENJAMIN KULL	TIMOTHY RODGERS
JOSEPH E. ELDER	LAURA L. LANSFORD	KENNETH SACK
DAVID L. ELLIOTT	DONALD W. LATON	STUART SAUNDERS
JENNIFER EPPERSON	PHILIP A. LEHMAN	NANCY E. SCOTT
CAROLINE FARMER	REBECCA E. LEM	JONATHAN D. SHAW
MARGARET A. FORCE	ANITA LEVEAUX-QUIGLESS	ADAM SHESTAK
TAWANDA N. FOSTER-WILLIAMS	ERYN E. LINKOUS	SCOTT T. SLUSSER
HEATHER H. FREEMAN	AMANDA P. LITTLE	DONNA D. SMITH
TERRENCE D. FRIEDMAN	TIFFANY LUCAS	ROBERT K. SMITH
ANDREW FURUSETH	STEVEN McALLISTER	MARC X. SNEED
ERICA GARNER	MARTIN T. McCRACKEN	M. JANETTE SOLES
LISA GLOVER	NEAL McHENRY	RICHARD G. SOWERBY, JR.
CHRISTINE GOEBEL	KEVIN G. MAHONEY	DANIEL SPILLMAN
MICHAEL DAVID GORDON	ANN W. MATTHEWS	JAMES M. STANLEY
DAVID GORE	SARAH Y. MEACHAM	IAIN M. STAUFFER
RICHARD A. GRAHAM	THOMAS G. MEACHAM, JR.	ANGENETTE R. STEPHENSON
KIMBERLY GRANDE	JESS D. MEKEEL	MARY ANN STONE
ANGEL E. GRAY	BRENDA E. MENARD	JENNIFER J. STRICKLAND
JOHN R. GREEN, JR.	MARY S. MERCER	SCOTT STROUD
DEBORAH GREENE	DERICK MERTZ	KIP D. STURGIS
ALEXANDRA S. GRUBER	ANNE M. MIDDLETON	SUEANNA P. SUMPTER
MARY E. GUZMAN	THOMAS H. MOORE	DAHR J. TANOURY
MELODY R. HAIRSTON	KATHERINE MURPHY	GARY M. TEAGUE
NANCY DUNN HARDISON	ELLEN A. NEWBY	KATHRYN J. THOMAS
LISA H. HARPER	JOHN F. OATES	JANE R. THOMPSON
JODI HARRISON	DANIEL O'BRIEN	JUDITH L. TILLMAN
RICHARD L. HARRISON	JANE L. OLIVER	TERESA L. TOWNSEND
WILLIAM P. HART, JR.	JAY L. OSBORNE	BRANDON L. TRUMAN
KATHRYNE HATHCOCK	DONALD O'TOOLE	PHYLLIS A. TURNER
CHRISTINA S. HAYES	ROBERTA A. OUELLETTE	JANELE VARLEY
ERNEST MICHAEL HEAVNER	SONDRA C. PANICO	RICHARD JAMES VOTTA
THOMAS D. HENRY	LAURA PARKER	CLARK WALTON
CLINTON C. HICKS	ELIZABETH F. PARSONS	GAINES M. WEAVER
ALEXANDER M. HIGHTOWER	BRIAN PAXTON	MARGARET L. WEAVER
TAMMERA S. HILL	JOHN A. PAYNE	JAMES A. WEBSTER
JENNIFER L. HILLMAN	PERRY PALAEZ	ELIZABETH J. WEESE
CHARLES H. HOBGOOD	JOHN PARRIS	OLIVER G. WHEELER
MARY C. HOLLIS	JACQUELINE M. PEREZ	CHARLES G. WHITEHEAD
JAMES C. HOLLOWAY	CHERYL A. PERRY	LARISSA S. WILLIAMSON
SUSANNAH P. HOLLOWAY	DONALD K. PHILLIPS	CHRISTOPHER H. WILSON
SHERRI HORNER	LAISHAWN L. PIQUANT	DONNA B. WOJCIK
DEREK HUNTER	EBONY J. PITTMAN	PATRICK WOOTEN
JOSEPH HYDE	KIMBERLY D. POTTER	HARRIET F. WORLEY
AMY KUNSTLING IRENE	LATOYA B. POWELL	ARTHUR YANCEY
TENISHA S. JACOBS	RAJEEV K. PREMAKUMAR	CLAUDE N. YOUNG, JR.
CREECY C. JOHNSON	BRIAN RABINOVITZ	WARD A. ZIMMERMAN
JOEL L. JOHNSON	STACY RACE	TAMARA S. ZMUDA

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	FRANK R. PARRISH	Elizabeth City
2	SETH H. EDWARDS	Washington
3A	W. CLARK EVERETT	Greenville
3B	SCOTT THOMAS	New Bern
4	ERNIE LEE	Clinton
5	BENJAMIN RUSSELL DAVID	Wilmington
6A	MELISSA PELFREY	Halifax
6B	VALERIE ASBELL	Ahoskie
7	ROBERT EVANS	Tarboro
8	C. BRANSON VICKORY III	Goldsboro
9	SAMUEL B. CURRIN	Oxford
9A	WALLACE BRADSHER	Roxboro
10	C. COLON WILLOUGHBY, JR.	Raleigh
11A	VERNON STEWART	Lillington
11B	SUSAN DOYLE	Smithfield
12	BILLY WEST	Fayetteville
13	JON DAVID	Bolivia
14	TRACEY CLINE	Durham
15A	PAT NADOLSKI	Graham
15B	JAMES R. WOODALL, JR.	Hillsborough
16A	KRISTY MCMILLAN NEWTON	Raeford
16B	L. JOHNSON BRITT III	Lumberton
17A	PHIL BERGER, JR.	Wentworth
17B	C. RICKY BOWMAN	Dobson
18	J. DOUGLAS HENDERSON	Greensboro
19A	ROXANN L. VANEKHOVEN	Concord
19B	GARLAND N. YATES	Asheboro
19C	BRANDY COOK	Salisbury
19D	MAUREEN KRUEGER	Carthage
20A	REECE SAUNDERS	Wadesboro
20B	TREY ROBINSON	Monroe
21	JIM O'NEILL	Winston-Salem
22	SARAH KIRKMAN	Lexington
22B	GARRY FRANK	Lexington
23	THOMAS E. HORNER	Wilkesboro
24	GERALD W. WILSON	Boone
25	JAMES GAITHER, JR.	Newton
26	ANDREW MURRAY	Charlotte
27A	R. LOCKE BELL	Gastonia
27B	RICHARD L. SHAFFER	Shelby
28	RONALD L. MOORE	Asheville
29A	BRADLEY K. GREENWAY	Marion
29B	JEFF HUNT	Hendersonville
30	MICHAEL BONFOEY	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
1	ANDY WOMBLE	Elizabeth City
3A	ROBERT C. KEMP III	Greenville
3B	JAMES Q. WALLACE III	Beaufort
5	JENNIFER HARJO	Wilmington
10	GEORGE BRYAN COLLINS, JR.	Raleigh
12	RON D. MCSWAIN	Fayetteville
14	LAWRENCE M. CAMPBELL	Durham
15B	JAMES E. WILLIAMS, JR.	Carrboro
16A	JONATHAN L. MCINNIS	Laurinburg
16B	ANGUS B. THOMPSON II	Lumberton
18	WALLACE C. HARRELSON	Greensboro
21	GEORGE R. CLARY III	Winston-Salem
26	KEVIN P. TULLY	Charlotte
27A	KELLUM MORRIS	Gastonia
28	M. LEANN MELTON	Asheville
29B	PAUL B. WELCH	Brevard

CASES REPORTED

	PAGE		PAGE
Adkins v. Stanly Cnty.		In re T.D.W.	539
Bd. of Educ.	642	Kelly v. Regency Ctrs. Corp.	339
Ahmadi v. Triangle		Langwell v. Albemarle Family	
Rent A Car, Inc.	360	Practice, PLLC	666
Allen v. Cnty. of Granville	365	Lato Holdings, LLC v.	
Bowles Auto., Inc. v. N.C. Div.		Bank of N.C.	332
of Motor Vehicles	19	Mace v. Pyatt	245
Brock & Scott Holdings,		Marzec v. Nye	88
Inc. v. Stone	135	Musick v. Musick	368
Caldwell v. Smith	725	Muter v. Muter	129
Campbell v. Duke Univ.		Norris v. Norris	566
Health Sys., Inc.	37	Pay Tel Commc'ns, Inc.	
Cary Creek Ltd. P'ship v.		v. Caldwell Cnty.	692
Town of Cary	99	Scott v. City of Charlotte	460
Cloninger v. N.C. Dep't of Health		State ex rel. Comm'r of Ins.	
& Human Servs.	345	v. Dare Cnty.	556
Combs v. City Elec. Supply Co.	75	State of N.C. Dep't of Health	
Crowley v. Crowley	299	& Human Servs. v. Armstrong ...	116
Dunton v. Ayscue	356	State v. Armstrong	399
First Charter Bank v. Am.		State v. Braswell	736
Children's Home	574	State v. Brennan	698
First Gaston Bank of N.C. v.		State v. Chery	310
City of Hickory	195	State v. Clodfelter	60
Gaines v. Cumberland Cnty.		State v. Cruz	230
Hosp. Sys., Inc.	213	State v. Curry	375
Goetz v. N.C. Dep't of Health		State v. Daniels	350
& Human Servs.	421	State v. Espinoza-Valenzuela	485
Gray v. RDU Airport Auth.	521	State v. Graves	123
Green v. Kearney	260	State v. Hager	704
Henry v. Knudsen	510	State v. Hagin	561
Hope-A Women's Cancer Ctr., P.A. v.		State v. Hall	712
N.C. Dep't of Health &		State v. Haymond	151
Human Servs.	276	State v. Hinson	172
Hope—A Women's Cancer Ctr., P.A.		State v. Holcombe	530
v. State of N.C.	593	State v. Jarrett	675
Huber Engineered Woods, LLC v.		State v. Johnson	718
Canal Ins. Co.	1	State v. Little	684
In re A.C.V.	473	State v. McCravey	627
In re A.S.	140	State v. McRae	319
In re D.L.D.	434	State v. Phillips	326
In re K.J.D.	653	State v. Roman	730
In re T.B., C.P., & I.P.	497	State v. Samuel	610
		State v. Taylor	448

CASES REPORTED

	PAGE		PAGE
State v. Wilson	110	Watkins v. Trogdon Masonry, Inc. . .	289
State v. Wilson	547	Wilson v. Wilson	45
Wallace Farm, Inc. v. City of Charlotte	144		

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE		PAGE
Apgar v. Crawford	149	In re M.T.T.	572
Babbert v. Sanders Ford	372	In re S.E.W. & J.A.W.	149
BenBow & Assocs. v. Altamont Dev.	149	In re S.L. & S.L.	572
Bennett v. Equity Residential	372	In re S.L.B.	740
Brock & Scott Holdings, Inc. v. Lee	740	In re S.T.F.	572
Daily Express, Inc. v. N.C. Dep't of Crime Control	372	In re T.E.S.	572
Darden v. Darden	572	In re Z.A.D.K. & T.J.P.K.	149
Dixon v. Sears Roebuck & Co.	740	In re Z.H.	572
E.B. Harris, Inc. v. Wiggins	572	In re Z.T. & E.T.	572
Earthmovers Equip. v. N.C. Dep't of Crime Control	372	Johnson v. Nash Cmty. Coll.	572
Edgerton v. Wythe Advantage	372	Joyner v. Bowen	372
Gamewell v. Gamewell	572	Keen Transp., Inc. v. N.C. Dep't of Crime Control	372
Gray v. Bryant	372	Llull v. Rose Furn.	572
Hanser v. Stonehouse	149	Long v. City of Charlotte	573
Harrison v. Lands End of Emerald Isle	372	Lucas v. Rockingham Cnty. Sch.	573
Hatley v. Cont'l Gen. Tire	372	Miller & Long v. Intracoastal Living	373
In re A.B.	372	Nesbit v. Cribbs	149
In re A.M.M.	149	Osman v. Reese	373
In re A.N.G.	372	Owens-Bey v. Cnty. of Forsyth	740
In re B.C.M.	572	Piedmont Area Mental v. City of Monroe	373
In re B.E. & B.E.	372	Raymond v. N.C. Police Benevolent Assoc.	373
In re B.L.H. & Z.L.H.	372	Rockingham Cnty. DSS v. Tate	573
In re C.S.	740	Scott v. N.C. Dep't of Corr.	373
In re D.J.J.H.	372	Starling v. Alexander Place Townhome	149
In re E.K. & J.R.	740	State v. Allen	149
In re E.T.T.	572	State v. Allen	740
In re I.E., E.E., A.E.	740	State v. Anderson	149
In re J.M.	572	State v. Anderson	373
In re J.S., C.Y., & M.Y.	149	State v. Batts	373
In re J.V.	740	State v. Bell	740
In re K.P., M.P., T.P.	572	State v. Beltran-Ponce	373
In re L.A.H., J.R.H., J.L.H.	149	State v. Blow	373
In re L.B.G.	572	State v. Bonner	149
In re L.K.M. & L.R.M.	572	State v. Brooks	373
In re Lo.H. & La.J.	572	State v. Broussard	149
In re M. M. E.	740		
In re M.A.P. & S.A.P.	149		
In re M.K.O.	740		

CASES REPORTED WITHOUT PUBLISHED OPINIONS

	PAGE		PAGE
State v. Brown	373	State v. Rambert	741
State v. Cannon	740	State v. Rice	573
State v. Capps	373	State v. Richardson	741
State v. Carter	740	State v. Royster	374
State v. Chambers	373	State v. Sears	741
State v. Crooms	373	State v. Sizemore	150
State v. Dawson	740	State v. Smith	374
State v. Edgeworth	741	State v. Smith	573
State v. Evans	741	State v. Stevens	374
State v. Freeman	149	State v. Tellez	374
State v. Frisby	150	State v. Todd	741
State v. Fritz	374	State v. Turnage	573
State v. Graham	150	State v. Webb	741
State v. Grange	374	State v. White	573
State v. Hightower	374	State v. Wilkins	741
State v. Howard	741	State v. Williams	150
State v. Kizer	150	State v. Wilson	742
State v. Lewis	374	State v. Wood	150
State v. Lipscomb	741	State v. Wright	742
State v. Manning	741		
State v. Massenburg	374	Tarasi v. Jugis	150
State v. McFadden	573	Town of Leland v. HWW, LLC	374
State v. McNeill	741		
State v. Miller	741	Valley Transp. v. N.C. Dep't of	
State v. Moore	573	Crime Control	374
State v. Mosley	741		
State v. Norton	741	W. Side Heavy v. N.C. Dep't of	
State v. Parks	374	Crime Control	374
State v. Parnell	150	Washington v. Mahbuba	573
State v. Person	374		

GENERAL STATUTES CITED

G.S.	
1-77	Caldwell v. Smith, 725
1-79	Caldwell v. Smith, 725
7B-507	In re A.S., 140
7B-805	In re K.J.D., 653
7B-807(a)	In re T.B., C.P., & I.P., 497
7B-905(c)	In re T.B., C.P., & I.P., 497
7B-1111(a)(5)	In re A.C.V., 473
14-7.3	State v. Taylor, 448
14-34.1(b)	State v. Curry, 375
14-100	Combs v. City Elec. Supply Co., 75
14-202.1	State v. Phillips, 326
14-208.6(1a)	State v. McCravey, 627
	State v. Phillips, 326
14-208.9A(a)(4)	State v. Braswell, 736
14-318.4(a2)	State v. Phillips, 326
15A-927(c)(1)	State v. Clodfelter, 60
15A-1335	State v. Daniels, 350
15A-1442(5b)(a)	State v. Hager, 704
15A-1444(a)	State v. Daniels, 350
20-108	Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles, 19
20-108(j)	Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles, 19
	Campbell v. Duke Univ. Health Sys., Inc., 37
36C-8-813	State v. Wilson, 110
58-2-80	State ex rel. Comm'r of Ins. v. Dare Cnty., 556
75-1.1	Combs v. City Elec. Supply Co., 75
87-1	Lato Holdings, LLC v. Bank of N.C., 332
130A-129(c)	Goetz v. N.C. Dep't of Health & Human Servs., 421
131E-176(16)(f1)	Hope—A Women's Cancer Center, P.A. v. N.C. Dep't of Health & Human Servs., 276

RULES OF CIVIL PROCEDURE CITED

Rule No.	
8(d)	Crowley v. Crowley, 299
9(j)	Allen v. Cnty. of Granville, 365
12(b)(1)	Dunton v. Ayscue, 356
12 (b)(6)	Green v. Kearney, 260
41(a)(1)	Dunton v. Ayscue, 356
56(c)	First Gaston Bank of N.C. v. City of Hickory, 195
	Dunton v. Ayscue, 356

59(a)	Musick v. Musick, 368
60	Musick v. Musick, 368

RULES OF EVIDENCE CITED

Rule No.	
403	State v. McCravey, 627
1003	Watkins v. Trogdon Masonry, Inc., 289

RULES OF APPELLATE PROCEDURE CITED

Rule No.	
2	State v. Brennan, 698
28(b)(6)	Ahmadi v. Triangle Rent A Car, Inc., 360
	Dunton v. Ayscue, 356
	State v. Hagin, 561

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

HUBER ENGINEERED WOODS, LLC, PLAINTIFF-APPELLEE V. CANAL INSURANCE
COMPANY, DEFENDANT-APPELLANT

No. COA09-335

(Filed 16 March 2010)

1. Insurance— automobile insurance contract—applicable law

The substantive law of Maine applied to a breach of contract case between a North Carolina building products manufacturer and an insurance company because the last act to make the automobile insurance contract binding occurred in Maine.

2. Insurance— automobile—duty to indemnify—summary judgment

The trial court erred in deciding on summary judgment the issue of defendant insurer's duty to indemnify plaintiff because an insurer may not litigate its duty to indemnify until the liability of the insured has been determined, and plaintiff's liability in this case had not been determined when the action was filed.

3. Insurance— automobile—duty to defend—insured—policy terms ambiguous

Plaintiff was an "insured" under the terms of an automobile insurance policy because plaintiff was facing liability because of "acts or omissions" of an employee of a named insured. Defendant's argument that the language "acts or omissions" necessarily meant "*negligent* acts or omissions" was overruled. The policy did not require negligence on the part of the named insured or its employees for plaintiff to be an "insured."

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

4. Insurance— automobile—duty to defend—insured—policy terms ambiguous

Defendant's argument that the term "because of" acts or omissions required a finding of proximate cause and limited defendant's duty to defend to instances of vicarious liability was overruled. The term was, at a minimum, ambiguous and therefore interpreted in favor of coverage. Because plaintiff's alleged liability could have arisen from an act or omission on the part of the insured under the policy, it was sufficient to trigger defendant's duty to defend.

5. Insurance— automobile—duty to defend

The trial court did not err in declaring that defendant insurance company had a duty to defendant plaintiff in a wrongful death action brought by the estate of a deceased employee because the employee exclusion clause of the automobile insurance policy at issue did not bar coverage under the facts of the case.

JACKSON, Judge, concurring in the result.

STEELMAN, Judge, concurring in part and dissenting in part.

Appeal by Defendant from order entered 15 December 2008 by Judge Jesse B. Caldwell, III in Superior Court, Mecklenburg County. Heard in the Court of Appeals 30 September 2009.

Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge, for Plaintiff-Appellee.

Smith Moore Leatherwood LLP, by Robert D. Moseley, Jr., C. Fredric Marcinak III, Sidney S. Eagles, Jr., and Elizabeth Brooks Scherer, for Defendant-Appellant.

McGEE, Judge.

Plaintiff is a North Carolina building products manufacturer and Defendant is a South Carolina insurer of trucking operations. W.M. Jr. Trucking, Inc. (W.M.) is a Maine trucking company. Plaintiff and W.M. entered into a contract (the contract) in 2004. In the contract, W.M. agreed to provide Plaintiff with trucking services. The contract required W.M. to maintain insurance, including "[b]road form comprehensive general liability insurance . . . for personal injury and property damage covering liability assumed by [W.M.] under this AGREEMENT." W.M. obtained a commercial automobile liability pol-

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

icy (the policy) from Defendant. According to an affidavit from Wallace Mahan, Jr., W.M.'s president, W.M. intended for the policy to fulfill the requirements of the contract, and "directly benefit" Plaintiff, affording Plaintiff with "protection against . . . bodily injuries arising from the performance of [W.M.'s] trucking services."

Joseph Nichols (Nichols), a truck driver employed by W.M., was fatally injured on 17 June 2005 after falling from his truck while attempting to secure a tarp over a load of plywood at Plaintiff's manufacturing plant in Easton, Maine. On 11 September 2006, Nichols' estate filed a wrongful death action against Plaintiff in superior court, Aroostook County, Maine. Plaintiff filed a complaint against Defendant in Mecklenburg County Superior Court on 4 March 2008. Plaintiff sought (1) compensatory damages for breach of contract and (2) compensatory damages, punitive damages, and attorney's fees for "bad faith." Plaintiff also sought an order compelling Defendant to "defend and indemnify" Plaintiff in the Maine action.

Defendant filed a motion to dismiss Plaintiff's action on 5 May 2008, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiff amended its complaint on 28 May 2008, specifically asking for a declaratory judgment that Defendant was obligated to defend and indemnify Plaintiff from the claims made against Plaintiff in the Maine action. By motion filed 9 June 2008, Defendant again moved to dismiss Plaintiff's amended complaint, pursuant to Rule 12(b)(6). In an order entered 22 July 2008, the trial court denied Defendant's motion to dismiss.

Plaintiff moved for summary judgment on its declaratory judgment action on 10 September 2008. By motion filed 15 September 2008, Defendant moved for summary judgment on the declaratory judgment action. By order entered 15 December 2008, the trial court denied Defendant's motion for summary judgment, granted Plaintiff's motion for summary judgment, and declared that the policy "provides defense and indemnity coverage to [Plaintiff] for the claims asserted against [Plaintiff]" in the Maine action. Defendant appeals.

In Defendant's two arguments on appeal, it contends that the trial court erred in denying its motion for summary judgment, in granting summary judgment in favor of Plaintiff, and in determining that the policy required Defendant to both defend and indemnify Plaintiff with respect to Nichols' 11 September 2006 action. We agree in part.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” The moving party bears the burden of demonstrating the lack of triable issues of fact. Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to present specific facts showing triable issues of material fact. On appeal from summary judgment, “we review the record in the light most favorable to the non-moving party.”

Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 26, 588 S.E.2d 20, 25-26 (2003) (internal citations omitted).

We first note that though this appeal is from an interlocutory order, the interlocutory order affects a substantial right of Defendant and, therefore, this appeal is properly before us. *Carlson v. Old Republic Ins. Co.*, 160 N.C. App. 399, 401, 585 S.E.2d 497, 499 (2003) (“An order of partial summary judgment on the issue of whether an insurance company has a duty to defend in the underlying action ‘affects a substantial right that might be lost absent immediate appeal.’ ” (Citation omitted)).

“Our review of the trial court’s construction of the provisions of an insurance policy is *de novo*.” *Smith v. Stover*, 179 N.C. App. 843, 845, 635 S.E.2d 501, 502 (2006) (citation omitted).

[1] Next, we must determine the correct substantive law to apply in this case.

[T]he general rule is that an automobile insurance contract should be interpreted and the rights and liabilities of the parties thereto determined in accordance with the laws of the state where the contract was entered even if the liability of the insured arose out of an accident in North Carolina. With insurance contracts the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract.

Fortune Ins. Co. v. Owens, 351 N.C. 424, 428, 526 S.E.2d 463, 465-66 (2000); *see also Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 187, 606 S.E.2d 728, 733 (2005) (“[T]he interpretation of a contract is governed by the law of the place where the contract was made[.]”); *N.C. Farm Bureau Mut. Ins. Co. v. Holt*, 154 N.C. App. 156, 163, 574 S.E.2d 6, 11 (2002) (citation omitted). Though this action was filed in North Carolina, Plaintiff and Defendant stipulated that W.M.

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

“obtained an automobile liability policy from [Defendant]. The [policy] was issued and delivered in Maine to [W.M.].” We therefore look to Maine substantive law to interpret the policy.

[2] We first address the issue of indemnification.

An insurer may not litigate its duty to indemnify until the liability of the insured has been determined. The duty to defend is broader than the duty to indemnify, and an insurer may have to defend before it is clear whether a duty to indemnify exists.

Hanover Ins. Co. v. Crocker, 688 A.2d 928, 929 n.1 (Me. 1997) (internal citations omitted); *see also Maine State Academy of Hair Design v. Commercial Union Ins. Co.*, 699 A.2d 1153, 1160 n.2 (Me. 1997); *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 36 (Me. 1991); *American Policyholders’ Ins. Co. v. Cumberland Cold Storage Co.*, 373 A.2d 247, 250-51 (Me. 1977); *but see Farm Bureau Mut. Ins. Co. v. Waugh*, 188 A.2d 889, 891-92 (Me. 1963). We are therefore constrained to hold that the trial court erred in deciding the issue of indemnification by summary judgment because the “liability of the insured” had not been determined when this action was filed, and we vacate that portion of the 15 December 2008 order.

[3] We must next address the issue of Defendant’s duty to defend Plaintiff.

We determine the duty to defend by comparing the allegations in the underlying complaint with the provisions of the insurance policy. “If a complaint reveals a ‘potential . . . that the facts ultimately proved may come within the coverage,’ a duty to defend exists.” *See also Gibson v. Farm Family Mut. Ins. Co.*, 673 A.2d 1350, 1352 (Me. 1996) (describing the comparison test as whether “there is *any potential basis* for recovery . . . regardless of the actual facts on which the insured’s ultimate liability may be based,” and stating that “[a]n insured is not at the mercy of the notice pleading of the third party suing him to establish his own insurer’s duty to defend.”). “Even a complaint which is legally insufficient to withstand a motion to dismiss gives rise to a duty to defend if it shows an intent to state a claim within the insurance coverage.”

Maine State Academy, 699 A.2d at 1156 (internal citations omitted).

For the judicial construction of policies of insurance this Court has adopted and soundly applied certain rational canons.

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

“No rule, in the interpretation of a policy, is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted. While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest, and the like, they will nevertheless enforce the salutary rule of construction, that, as the language of the condition is theirs, and it is therefore in their power to provide for every proper case, it is to be construed most favorably to the insured.”

. . . .

“In case of ambiguity or inconsistency, it is often said that the court will give the policy a construction most favorable to the assured, for the reason that, as the insurer makes the policy and selects his own language, he is presumed to have employed terms which express his real intention.”

. . . .

“A contract of insurance, like any other contract, is to be construed in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument. All parts and clauses must be considered together that it may be seen if and how far one clause is explained, modified, limited, or controlled by the others.”

Waugh, 188 A.2d at 891-92 (internal citations omitted); *see also Tinker v. Continental Ins. Co.*, 410 A.2d 550, 553-54 (Me. 1980).

Defendant argues that Plaintiff is not an “insured” under the policy. The policy includes a section entitled “Persons Insured.” Plaintiff argues, and Defendant disputes, that Plaintiff is an “insured” pursuant to section (d) of the “Persons Insured” provision. The “Persons Insured” provision states in relevant part: “Each of the following is an insured under [the policy] to the extent set forth below:”

. . . .

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

(d) any other . . . organization but only with respect to . . . its liability because of acts or omissions of an **insured** under (a), (b) or (c) above.

Section (c) is the provision mentioned in section (d) relevant to this appeal. Section (c) states in relevant part:

any other person while using an **owned automobile** . . . with the permission of the **named insured** [W.M.], provided his actual . . . use thereof is within the scope of such permission, but with respect to **bodily injury** . . . arising out of the loading or unloading thereof, such other person shall be an **insured** only if he is:

. . . .

(2) an employee of the **named insured**[.]

Nichols was employed by W.M., and he was fatally injured while using an “owned automobile” of W.M., with permission, and within the scope of that permission. Nichols was therefore an “insured” under the policy. Plaintiff argues that pursuant to section (d), it is an “insured” because it is facing “liability because of acts or omissions of an insured,” namely Nichols.

Defendant contends that Plaintiff is not an “insured” because section (d) does not cover Plaintiff. Defendant argues, citing several cases from other jurisdictions, that section (d) is a vicarious liability clause. *See, e.g., Vulcan Materials Co. v. Casualty Ins. Co.*, 723 F.Supp. 1263, 1265 (N.D. Ill. 1989); *Garcia v. Federal Ins. Co.*, 969 So.2d 288 (Fla. 2007); *Transportation Ins. Co. v. George E. Failing Co., Div. of Azcon*, 691 S.W.2d 71 (Tex. App. 1985). While we agree with Defendant that these opinions interpret provisions similar to the provision at issue in this case as simple vicarious liability provisions, none of these opinions have any precedential value in Maine. We find no Maine cases on point, and thus must turn to the Maine laws of insurance policy interpretation to resolve this issue.

Defendant contends, relying on cases like *Vulcan*, *Garcia*, and *Transportation Ins. Co.*, that the language “acts or omissions” contained in section (d) necessarily means *negligent* “acts or omissions,” and is thus restricted to instances where negligence on the part of the insured has been alleged, and forms part of the basis for the underlying suit. Defendant argues, in other words, that because Nichols’ action against Plaintiff does not rely on any alleged negligence of Nichols, but solely on the alleged negligence of Plaintiff, section (d) does not apply, and Defendant has no duty to defend.

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

However, section (d) of the policy does not mention “vicarious liability,” and does not speak in terms of “*negligent* acts or omissions,” but simply in terms of “acts or omissions.” (Emphasis added). Defendant “enjoyed full contractual freedom when it issued the policy. Had [Defendant] elected to [limit the coverage in the manner it now argues] it could have effected its purpose with trifling effort.” *Waugh*, 188 A.2d at 892. There is a dispute concerning the meaning of “acts or omissions,” and this language is susceptible to two reasonable interpretations. “Whether or not a contractual term is ambiguous is a question of law.” *Bourque v. Dairyland Ins. Co.*, 741 A.2d 50, 53 (Me. 1999).

A policy is ambiguous if it is reasonably susceptible of differing interpretations. In determining whether the contract is ambiguous, it is evaluated as a whole and must be construed in accordance with the intention of the parties. When applying these rules of construction, we view the language from the perspective of an average person, untrained in either the law or insurance.

Foundation for Blood Research v. St. Paul Marine & Fire Ins. Co., 730 A.2d 175, 180 (Me. 1999) (citations omitted). We have not found any Maine opinion interpreting “acts or omissions” in this context. We therefore look to other jurisdictions for guidance. As we have already noted, Defendant cites to cases interpreting language very similar to that included in the policy before us as constituting a simple vicarious liability provision. In each of these cases, the appellate court assumed the term “acts or omissions” referred to legal negligence. Other courts have interpreted “acts or omissions” differently.

In *Maryland Cas. Co. v. Regis Ins. Co.*, 1997 U.S. Dist. LEXIS 4359 (E.D. Pa. Apr. 1, 1997), the United States District Court rejected the argument that the term “act or omission” in an insurance policy required negligence.

The plain or ordinary meaning of “act or omission” only requires the named insured to do or fail to do something. Negligence would require the named insured to do [or fail to do] something “which a reasonable [person] guided by those ordinary considerations which ordinarily regulate human affairs, would do [or would not do].”

Maryland Cas. Co. v. Regis Ins. Co., 1997 U.S. Dist. LEXIS 4359 at 13-14. The court in *Maryland Cas.* held that the term “act or omission” was ambiguous, and it looked with disfavor on another United

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

States District Court opinion that had “added the word ‘negligent’ before acts or omissions[;]” stating it would “not read such language into the [policy] where none exists in order to interpret the clause in favor of the insurer.” *Id.* at 15, n4. In *Dillon Cos. v. Royal Indem. Co.*, 369 F. Supp. 2d 1277, 1288 (D. Kan. 2005) the court found “that a reasonable insured could understand ‘acts or omissions’ to mean all acts or omissions, negligent or not.” The *Dillon* Court concluded “that the phrase ‘acts and omissions of [the employer]’ include[d] any act or failure to act by [an employee,]” not just negligent acts or omissions by the employee. *Id.*; see also *United States Fire Ins. Co. v. Aetna Life & Cas.*, 684 N.E.2d 956, 962 (Ill. App. Ct. 1st Dist. 1997).

We agree with Judge Jackson in her concurring opinion that, on its face, the term “act or omission” appears unambiguous. We do not have to reach a holding on that issue, however. Because we are applying Maine substantive law, we decide not to make an unnecessary holding on the definition of “act or omission.” We need only hold that the term “act or omission” is, at a minimum, reasonably susceptible to differing interpretations. “Act or omission” as it is utilized in the policy is, at a minimum, ambiguous. *Blood Research*, 730 A.2d at 180; see also *Foremost Ins. Co. v. Levesque*, 868 A.2d 244, 247 (Me. 2005). Ambiguity will be decided in favor of coverage, unless the clear intent of the parties to the policy dictates otherwise. *Waugh*, 188 A.2d at 891-92. We do not find any clear expression of intent on the part of either Defendant or W.M., at the time the policy was executed, to exclude Plaintiff from coverage under the policy for the action filed against Plaintiff. However, the president of W.M. executed an affidavit subsequent to the death of Nichols, stating that it was W.M.’s “understanding and intention that [the policy] provided the coverage called for in [the contract], and that said insurance would, therefore, directly benefit [Plaintiff.] It was [W.M.’s] understanding and intention to afford such customers protection against . . . bodily injuries arising from the performance of [W.M.’s] trucking services.” We hold that section (d) of the policy did not require negligence on the part of W.M. (or Nichols), but merely that Plaintiff was subject to liability “because of” the acts or omissions of W.M. or Nichols.

[4] Defendant argues that the term “because of” in the relevant policy provision also limits Defendant’s duty to defend to instances of vicarious liability. Defendant contends that the term “because of” requires a finding of proximate cause, whereas Plaintiff argues “because of” should be defined by its commonly understood meaning. Unfortunately, Defendant does not define “because of” in the policy.

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

Courts in multiple jurisdictions have struggled to decide how language such as “because of,” “as the result of,” “caused by,” and “arising out of” should be interpreted. Certain courts have decided some of these terms require a finding of proximate cause, while other courts have found that these terms merely require a finding of “but for” causation. *Vulcan*, 723 F. Supp. at 1265; *Garcia v. Federal Ins. Co.*, 969 So. 2d 288 (Fla. 2007) (opinions interpreting policy phrases including “because of” as referring to proximate cause or requiring evidence supporting vicarious liability).

The words ‘arising out of’ are not words of narrow and specific limitation but are broad, general, and comprehensive terms affecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than ‘caused by.’ They are ordinarily understood to mean . . . ‘incident to,’ or ‘having connection with’ the use of the automobile[.]

The parties do not, however, contemplate a general liability insurance contract. There must be a causal connection between the use and the injury. This causal connection may be shown to be an injury which is the natural and reasonable incident or consequence of the use, though not foreseen or expected, but the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile.

State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 318 N.C. 534, 539, 350 S.E.2d 66, 69 (1986); see also *Maryland Cas.*, 1997 U.S. Dist. LEXIS 4359 at 13 (holding that “as a result of” did not impose “a greater causation requirement than the ‘but for’ causation applied by courts in cases with clauses using ‘arising out of’ ”); *Brewer v. Cabarrus Plastics, Inc.*, 357 N.C. 149, 579 S.E.2d 249 (2003), *adopting the dissent from Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 88, 551 S.E.2d 902, 906 (2001) (“In the common vernacular, the phrases ‘but for,’ ‘because of,’ and ‘on account of’ are used interchangeably.”) (emphasis added); *Warren v. Wilmington*, 43 N.C. App. 748, 750, 259 S.E.2d 786, 788 (1979) (“ ‘Arising out of’ the employment is construed to require that the injury be incurred because of a condition or risk created by the job. There must be a causal relation between the job and the injury.”).

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

In fact, one of the cases cited by Defendant, *Garcia*, was the response of the Supreme Court of Florida to a certified question posed by the Eleventh Circuit. *Garcia v. Fed. Ins. Co.*, 473 F.3d 1131 (11th Cir. Fla. 2006). The Eleventh Circuit, after struggling to determine the meaning of both “because of” and “acts or omissions,” certified the following question to the Florida Supreme Court: “Is an insurance policy that defines a covered person as ‘any other person with respect to liability because of acts or omissions’ of the insured ambiguous?” *Id.* at 1136. Though the Florida Supreme Court ultimately held that the provision in *Garcia* was a vicarious liability provision under Florida law, the Eleventh Circuit clearly believed the language was reasonably susceptible to different interpretations, thus prompting certification of the question to the Florida Supreme Court. We find the term “because of” to be, at a minimum, ambiguous, and therefore interpret it in favor of coverage. *Waugh*, 188 A.2d at 891-92. Viewing the language “because of” “from the perspective of an average person, untrained in either the law or insurance[,]” we afford it its plain meaning, not the legal meaning of “proximate cause.” *Blood Research*, 730 A.2d at 180.

We find *United States Fire Ins.*, *supra*, instructive. *United States Fire Ins.* was decided under Illinois law, which, relevant to this appeal, is similar to Maine law. In *United States Fire Ins.*, Gateway, a subcontractor, obtained a general liability policy from USFI which covered the general contractor, Perini Building (the defendant), “but only with respect to acts or omissions of the named insured [Gateway] in connection with the named insured’s operations at the applicable location designated.” *United States Fire Ins.*, 684 N.E.2d at 958. Startz, an employee of Gateway, was injured while working for Gateway on a project (the Argonne project) run by the defendant. Startz brought action against the defendant based, in part, upon the defendant’s negligence. Startz did not bring suit against his employer, Gateway. *Id.* at 958-59. The Court in *United States Fire Ins.* held:

A comparison of the allegations in the complaint and the endorsement raises the potential for coverage and, in turn, a potential for coverage is all that is necessary to trigger USFI’s duty to defend. When injured, Startz was an employee of Gateway (the named insured), was performing tasks required of him (“in connection with the named insured’s operations”), and was working at the Argonne construction project (“at the applicable location designated”). Defendant[’s] alleged liability to Startz potentially could have arisen from an act or omission on the part

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

of Gateway, whether or not the act or omission rises to the level of negligence. Such a possibility is sufficient to trigger the duty to defend on the part of Gateway's insurer (USFI) under the additional insured endorsement.

Id. at 963.

In the case before us, Nichols, working for W.M. in the course of W.M.'s regular business, was fatally injured on the job. Nichols' estate sued Plaintiff, claiming Plaintiff's negligence led to Nichols' death. Nichols' estate did not sue W.M. These facts are nearly identical to those present in *United States Fire Ins.* The *United States Fire Ins.* Court, applying law very similar to that of Maine, found no issue with the fact that Startz, the injured party, sued the defendant directly for the defendant's alleged negligence, and did not sue the named insured, Gateway, his employer. We hold that Plaintiff's alleged liability to Nichols' estate "potentially could have arisen from an act or omission on the part of [an insured under the policy], whether or not the act or omission [rose] to the level of negligence." *Id.* This possibility was "sufficient to trigger the duty to defend[.]" *Id.* This argument is without merit.

We disagree with the dissent's contention that our decision relies in any part on Plaintiff's affirmative defense of comparative negligence to Nichols' estate's claim against Plaintiff. As we have stated above, we hold that no showing of negligence on the part of Nichols was required to trigger Defendant's duty to defend. We clearly agree with the dissent that a "number of other courts have considered the arguments made by [P]laintiff in the instant case and found them to be without merit." We have cited such cases above without reservation. It is equally clear, however, that a number of other jurisdictions have considered the arguments made by Plaintiff and found merit therein. It is precisely this split in authority that augments our holding regarding the ambiguities inherent in the policy. Insurance companies can avoid the risks inherent in ambiguous policy language by drafting clearer language. As the drafter of the policy before us, only Defendant was in a position to more clearly indicate the limits of coverage under the policy.

[5] Defendant contends in its second argument that the trial court erred in finding Defendant had a duty to defend Plaintiff because the policy included an employee exclusion clause which barred coverage on the facts of this case. We disagree.

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

The policy included the following language:

Exclusions: This insurance does not apply:

. . . .

(c) to **bodily injury** to any employee of the **insured** arising out of and in the course of his employment by the **insured** or to any obligation of the **insured** to indemnify another because of damages arising out of such injury, but this exclusion does not apply to any such injury arising out of and in the course of domestic employment by the **insured** unless benefits therefore are in whole or in part either payable or required to be provided under any workmen's compensation law[.]

We first note that the intent behind this provision appears to be to deny coverage for the employee in instances where the injured employee is eligible to collect workers' compensation benefits. Further, language used throughout the policy refers to "any insured," "an insured," "the named insured," "the designated insured," and "the insured."

[W]e hold that by excluding coverage for damages intentionally caused by "an insured person," Allstate unambiguously excluded coverage for damages intentionally caused by *any* insured person under the policy. "An" is an indefinite article routinely used in the sense of "any" in referring to more than one individual object.

Johnson v. Allstate Ins. Co., 687 A.2d 642, 644 (Me. 1997). However,

provisions excluding from coverage injuries . . . caused by "the insured" refer to a definite, specific insured, who is directly involved in the occurrence that causes the injury. *Western Casualty & Surety Co. v. Aponaug Mfg. Co.*, 197 F.2d 673, 674 (5th Cir. 1952) (use of "the" insured would not affect coverage of other insureds); *Arsenon v. National Auto. and Casualty Ins. Co.*, 45 Cal. 2d 81, 286 P.2d 816, 818 (Cal. 1955) (use of "the" insured in exclusion clause did not preclude recovery of other insureds); *Pawtucket Mut. Ins. Co. v. Lebrecht*, 104 N.H. 465, 190 A.2d 420, 423 (N.H. 1963) (use of "the" and "an" insured in same policy indicates an intent to cover different situations; "the" insured refers to definite, specific insured who is seeking coverage); *Unigard Mut. Ins. Co. v. Argonaut Ins. Co.*, 20 Wash. App. 261, 579 P.2d 1015, 1019 (Wash. Ct. App. 1978) (coverage and exclusion defined in terms of "the" insured create separate oblig-

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

ations to several insureds). The “the insured” language in this policy differs from the “an insured” exclusion language present in other policies. Such “an insured” language in an exclusion clause is equated with “any insured” and means that the conduct of any insured that is excluded from coverage bars coverage for each insured under the policy. Such is not the case with [this] policy[.]

Crocker, 688 A.2d at 931; *see also Korhonen v. Allstate Ins. Co.*, 827 A.2d 833, 837-38 (Me. 2003). As the Supreme Judicial Court of Maine has determined that “the insured” refers only to the person or entity seeking coverage, we must apply that definition to the facts of this case. Plaintiff is the entity seeking coverage; therefore, the language referring to “the insured” in the exclusionary provision must refer to Plaintiff, and cannot refer to W.M. Nichols was employed by W.M., not Plaintiff. Therefore, because Nichols was not an employee of Plaintiff, by the express language of the exclusionary provision, the exclusionary provision does not apply on the facts before us.

We therefore affirm the trial court’s ruling that Defendant has a duty to defend Plaintiff in the action brought against Plaintiff by Nichols’ estate. The issue of indemnification should be addressed, if necessary, after the issue of Plaintiff’s liability to Nichols’ estate has been finally determined.

Affirmed in part, vacated in part.

Judge JACKSON concurs in the result with a separate opinion.

Judge STEELMAN concurs in part and dissents in part with a separate opinion.

JACKSON, Judge, concurring in the result.

I concur in the result reached by the majority; however, I write separately to express my concern with respect to the precedential effect of the majority’s holding that “the term ‘act or omission’ is . . . reasonably susceptible to differing interpretations[.]” and is therefore “ambiguous.” The phrase “act or omission” is commonplace in legal practice and legal writing, and to hold that the phrase, standing alone, is ambiguous may have regrettable consequences.

Black’s Law Dictionary defines “act” as “[s]omething done or performed” or “[t]he process of doing or performing; an occurrence that results from a person’s will being exerted on the external world[.]”

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

Black's Law Dictionary 27 (9th ed. 2009). Black's Law Dictionary defines "omission" as "[a] failure to do something" or "[t]he act of leaving something out." Black's Law Dictionary 1197 (9th ed. 2009).

Other jurisdictions previously have interpreted provisions in other insurance contracts similar to the provision at issue here. *See, e.g., Dillon Cos. Inc. v. Royal Indem. Co.*, 369 F. Supp. 2d 1277, 1287-88 (D. Kan. 2005); *Vulcan Materials Co. v. Casualty Ins. Co.*, 723 F. Supp. 1263, 1265 (N.D. Ill. 1989); *Maryland Cas. Co. v. Regis Ins. Co.*, 1997 WL 164268, 1997 U.S. Dist. LEXIS 4359 (E.D. Pa. Apr. 1, 1997); *Garcia v. Federal Ins. Co.*, 969 So. 2d 288 (Fla. 2007); *Transp. Ins. Co. v. George E. Failing Co.*, 691 S.W. 2d 71 (Tex. App. 1985). However, the fact that the underlying causes of action in those cases sounded in negligence does not render the term "act or omission" ambiguous by virtue of its being susceptible to differing interpretations, even though the phrase, standing alone, is broad enough to include causes of action other than negligence.

To the contrary, I believe that the phrase is clear and unambiguous. *Maryland Cas. Co.* correctly explained that

[t]he plain or ordinary meaning of "act or omission" only requires the named insured to do or fail to do something. Negligence would require the named insured to do [or fail to do] something "which a reasonable [person] guided by those ordinary considerations which ordinarily regulate human affairs, would do [or would not do]."

Maryland Cas. Co., 1997 WL 164268, at *5, 1997 U.S. Dist. LEXIS 4359, at *13-14 (citation omitted). The phrase "act or omission," is plain, but it is also broad and inclusive, and it therefore is applicable in various contexts—whether in a suit for negligence or for some other tort. The foregoing quotation from *Maryland Cas. Co.* simply illustrates that court's analysis of the "plain and ordinary meaning of 'act or omission'" with respect to the law of negligence, but the phrase is still clear and unambiguous, although it may be applied in other contexts.

I do not mean to imply that this Court should read any missing modifiers (*e.g.*, "negligent" act or omission; "intentional" act or omission) into an insurance policy. Rather, it is incumbent upon defendant, as the drafter of the insurance policy, to limit the scope of policy coverage if, and as, it desires to do so with obvious due regard for established public policy and constraints on unconscionability. As the majority explains, "Defendant 'enjoyed full contractual freedom

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

when it issued the policy. Had [Defendant] elected to [limit the coverage in the manner it now argues,] it could have effected its purpose with trifling effort.’ ” See *Farm Bureau Mut. Ins. Co. v. Waugh*, 188 A.2d 889, 892 (Me. 1963) (citation omitted). Here, however, defendant failed to modify “act or omission,” and the plain meaning of the phrase is apparent, albeit broad.

Accordingly, I perceive a precedential danger in holding, without qualification, that the phrase “act or omission” is ambiguous, and I do not believe the phrase, standing alone, is ambiguous. However, because the plain meaning of the unmodified phrase “act or omission” contained within the policy already extends coverage to plaintiff without resorting to rules of construction attendant to a purported ambiguity, I join in the result reached in the majority as limited by this concurrence.

STEELMAN, Judge, concurring in part and dissenting in part.

I concur in the majority’s conclusion that a substantial right is affected and that defendant’s appeal of the trial court’s interlocutory order is properly before this Court. I also concur in the majority’s determination that the construction of the insurance policy is governed by Maine law.

It should be noted at the outset that this action is between Huber and Canal. W.M. Jr. Trucking, Inc. (W.M.) is not a party to this action. There is nothing in the record that suggests that Canal was aware of the Transportation Contract between Huber and W.M., and its terms are irrelevant to the issues presented in this case.

Is Huber an “Insured” Under the Canal Policy?

Nichols was a driver for W.M. and died as a result of injuries received while picking up a load of plywood at Huber’s Easton, Maine plant. W.M. had procured a liability insurance policy from Canal, which insured the vehicle being operated by Nichols. The Canal policy defines an “insured” as follows:

III. PERSONS INSURED: Each of the following is an insured under this insurance to the extent set forth below:

- (a) the named insured;
- (b) any partner or executive officer thereof, but with respect to a temporary substitute automobile only while such automobile is being used in the business of the named insured;

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

- (c) any other person while using an owned automobile or a temporary substitute automobile with the permission of the named insured, provided his actual operation of (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be insured only if he is:
 - (1) a lessee or borrower of the automobile, or
 - (2) an employee of the named insured or of such lessee or borrower;
- (d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a), (b) or (c) above.

Nichols' estate filed suit against Huber in the Superior Court of Aroostook County, Maine seeking damages for wrongful death based upon the negligence of Huber. Huber asserted as a defense the negligence of Nichols under Maine's comparative negligence statute. Me. Rev. Stat. Ann. Tit. 14, § 156. Based upon this assertion of the negligence of Nichols contributing to his injuries, Huber makes the creative argument that it is an insured under the Canal policy.

The majority has gone to great lengths to find ambiguities in the Canal policy and hold that Huber is an "insured." There are no ambiguities in the Canal policy, and the concept that the Canal policy provides any liability coverage to Huber is patently absurd.

Huber's argument is that Nichols is an "insured" under section III(c) of the policy as set forth above. Huber then argues that it is also an insured under section III(d) because it is facing liability because of "acts or omissions of an insured," i.e. Nichols. Huber does not face liability because of any acts of Nichols, but rather by virtue of allegations of *its own negligence* by the representatives of Nichols' estate. The majority distorts an affirmative defense, Maine Rules of Civil Procedure, Rule 8, which may or may not reduce the liability of Huber into a basis for finding coverage under an insurance policy.

The purpose of liability insurance is not to indemnify third parties who may injure or damage the policy holder or their agents and employees. Instead, "[l]iability insurance is a contract of indemnity for the benefit of the insured and those in privity with the insured, or those to whom the statute, upon the grounds of public policy, extends the indemnity against liability." 43 Am. Jur. 2d *Insurance* § 4 (2009).

HUBER ENGINEERED WOODS, LLC v. CANAL INS. CO.

[203 N.C. App. 1 (2010)]

... literalism should not be pushed to the length of frustrating, in whole or in part, the general intention the contract evidences; nor, on the other hand, should words be made to mean what they do not really say. A contract should be so construed as to give it only such effect as was intended when it was made. Astute and subtle distinctions should not be attempted, to take a plain case from the operation of material bounds.

Johnson v. American Automobile Ins. Co., 161 A. 496, 498 (Me. 1932) (citing *Mack v. Rochester German Ins. Co.*, 13 N.E. 343 (N.Y. 1887), and *Lyman & others v. State Mutual Fire Insurance Company*, 96 Mass. (14 Allen) 329 (1867)); see also *Poisson v. Travelers Ins. Co.*, 31 A.2d 233, 235 (Me. 1943).

While I understand that this case involves the construction of a Maine insurance policy by a North Carolina Court, and will likely never be considered outside of the context of the present case, I believe that the ramifications of the majority's decision are significant. Under an insurance policy containing the same or similar language, a defendant in a lawsuit arising out of an automobile accident asserting contributory negligence on the part of the plaintiff could demand a defense, and possibly coverage from a plaintiff's insurance carrier. This is fundamentally inconsistent with the purpose of a party procuring liability insurance.

A number of other courts have considered the arguments made by plaintiff in the instant case and found them to be without merit. *Canal Ins. Co. v. Earnshaw*, 629 F. Supp. 114, 120 (D. Kan. 1985), *Vulcan Materials Co. v. Casualty Ins. Co.*, 723 F. Supp. 1263, 1264-65 (N.D. Ill. 1989), *Koch Asphalt Co. v. Farmers Ins. Group*, 867 F.2d 1164, 1166 (8th Cir. 1989), *Transport Ins. Co., Inc. v. Post Express Co., Inc.*, 1993 U.S. Dist. Lexis 5706 (N.D. Ill. 1993).

I would reverse the ruling of the trial court.

Applicability of Exclusion for Injury to Employee

I would also hold that the exclusion contained in section I(c) of the policy is applicable and bars any coverage to Huber.

The applicable provision states:

This insurance does not apply:

(c) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

obligation of the insured to indemnify another because of damages arising out of such injury;

. . .

The named insured under the policy was W.M. Nichols was an employee of W.M. Nichols was injured in the course of his employment with W.M. The exclusion is clear, is applicable to the facts of this case, and bars any coverage to Huber.

Conclusion

I would reverse the ruling of the trial court that Canal's policy "provides defense and indemnity coverage to Huber for the claims asserted against Huber" in the Maine action filed by Nichols' estate. This matter should be remanded to the Superior Court of Mecklenburg County for entry of judgment dismissing this action, with prejudice.

BOWLES AUTOMOTIVE, INC., PLAINTIFF V. NORTH CAROLINA DIVISION OF MOTOR
VEHICLES, DEFENDANT

No. COA08-1411

(Filed 16 March 2010)

1. Appeal and Error— preservation of issues—notice of appeal from judgment rather than summary judgment denial

Defendant waived appellate review of an argument concerning the denial of summary judgment where it gave notice of appeal from the judgment in favor of plaintiff but not from the order denying its motion for summary judgment.

2. Appeal and Error— preservation of issues—motions for directed verdict denied—no motion on issue appealed from

An argument about the denial of defendant's motion for directed verdict was dismissed where defendant did not make a motion for directed verdict on the only issue that remained after the trial court granted defendant's motions for directed verdicts on other issues.

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

3. Appeal and Error— preservation of issues—issues conceded or not raised at trial

Defendant did not preserve for appellate review questions of whether he was entitled to directed verdict on his *quantum meruit* claim or whether N.C.G.S. § 20-108(j) operates as a waiver of sovereign immunity. The *quantum meruit* issue was conceded and defendant did not argue waiver of sovereign immunity under this statute at trial.

4. Motor Vehicles— storage fee for recovered stolen motorcycles—not excessive

The trial court did not abuse its discretion by denying defendant's motion to set aside or remit the jury verdict on the argument that an award was excessive in an action for storage fees for stolen motorcycles and parts seized by the State. Although the State argued that it should be liable for storage costs only up to the filing date for the dispositional actions, the motorcycles and parts remained in storage far beyond that date and there was no evidence of a difference in storage or benefit to defendant before and after that date.

5. Motor Vehicles— storage of recovered stolen motorcycles—fee—not limited to value of vehicle

Plaintiff's recovery for storing stolen motorcycles and parts seized by the State was not limited by N.C.G.S. § 20-108(j) to the value of the parts and vehicles. The Legislature intended that a private garage recover reasonable compensation for services related to seizure under N.C.G.S. § 20-108 as a separate remedy from lienor rights. There is nothing in the statute or legislative history to indicate that the qualification of compensation as reasonable should tie the storage charge to the value of the vehicle.

Appeal by Defendant from order entered 23 June 2008 by Judge Theodore S. Royster, Jr. in Iredell County District Court. Heard in the Court of Appeals 8 June 2009.

Ott Cone & Redpath, P.A., by Melanie M. Hamilton, for Plaintiff.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton and Assistant Attorney General John W. Congleton, for the State.

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

STEPHENS, Judge.

*I. Procedural History and Factual Background**A. The Division's Eleven Actions*

The litigation surrounding this case began in May 2004 when, pursuant to N.C. Gen. Stat. § 20-108 (2009),¹ the North Carolina Division of Motor Vehicles (“Defendant” or “the Division”) filed eleven “dispositional civil actions” in the District Court of Iredell County² to determine the ownership and proper disposition of stolen motorcycles and parts, which had been seized by the Division during the investigation of a motorcycle theft ring and were being held in storage by Bowles Automotive, Inc. (“Plaintiff” or “Bowles”). Plaintiff filed counterclaims in each of the eleven actions, seeking to enforce its storage lien under N.C. Gen. Stat. § 44A. In March 2006, Bowles amended its counterclaims, asserting a claim for breach of contract against the Division for failure to pay towing and storage fees to Plaintiff.

On 6 March 2007, Bowles filed a motion in district court for summary judgment on the Division’s eleven actions. Judge April Wood denied Bowles’ motion in an order entered 13 July 2007 finding that “neither party [was] entitled to judgment as a matter of law.”

B. Background of Plaintiff's Separate Claim

On 9 May 2006, Plaintiff filed a separate lawsuit for breach of contract against Defendant, and it is this action which forms the basis for Defendant’s appeal. The procedural history of Plaintiff’s lawsuit is confusing at best, and it has taken an exorbitant amount of this Court’s energy to decipher the record on appeal and to determine how this matter was resolved at the trial court level. The caption on Plaintiff’s original complaint, “IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION[,]” indicates that Plaintiff filed its action in superior court.³ On 26 June 2006, by a pleading entitled

1. N.C. Gen. Stat. § 20-108 governs procedures relating to stolen vehicles. Subparagraph (j) provides that “[a]n officer taking into custody a motor vehicle or component part under the provisions of this section is authorized to obtain necessary removal and storage services, but shall incur no personal liability for such services. The person or company so employed shall be entitled to reasonable compensation as a claimant under (e), and shall not be deemed an unlawful possessor under (a).”

2. The file numbers on the Division’s eleven actions brought in district court are 04 CVD 923, 925, 926, 927, 928, 929, 930, 931, 932, 933, and 934.

3. That Plaintiff would have chosen to file its separate action in superior court, rather than district court, would have been logical, given that Plaintiff sought \$483,565.00, plus interest, in damages. See N.C. Gen. Stat. § 7A-243 (2009) (“Except as

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

“Motion to Strike, Motions to Dismiss and Answer” bearing the court file number “06 CRS 1249” and indicating that the document was filed in the “Superior Court Division,” Defendant responded to Plaintiff’s complaint and filed motions to dismiss Plaintiff’s lawsuit on the grounds: (1) of sovereign immunity; (2) that Plaintiff failed to state a claim upon which relief can be granted; (3) that Plaintiff never entered into a legally enforceable contract with the State; (4) that the statute of limitations had expired; and (5) under the doctrine of laches on the grounds of undue prejudice and unreasonable delay. Subsequent court documents contained in the record on appeal, however, reveal that Plaintiff’s action was eventually disposed of in district court, although no order transferring the matter from superior court to district court appears in the record.

Despite the amount of damages sought by Plaintiff, it is clear that Plaintiff’s original action could have been brought in either the district court or the superior court division of the General Court of Justice. “[O]riginal general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice.” N.C. Gen. Stat. § 7A-240 (2007).

For the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions and proceedings in accordance with the allocations provided in this Article. But no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding.

N.C. Gen. Stat. § 7A-242 (2007). “It is, therefore, evident that except for areas specifically placing jurisdiction elsewhere (such as claims under the Workers’ Compensation Act) the trial courts of North Carolina have subject matter jurisdiction over all justiciable matters of a civil nature.” *Harris v. Pembaur*, 84 N.C. App. 666, 668, 353 S.E.2d 673, 675 (1987) (internal quotation marks omitted).

otherwise provided in this Article, . . . the superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars (\$10,000).”).

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

However, the superior court and the district court are two different divisions of the General Court of Justice, and one division cannot obtain jurisdiction over a matter that originates in the other division without a resolution of some kind in the original division. Thus, for the district court to obtain jurisdiction over a superior court case, the matter would have to be transferred either by written motion of one of the parties or by the judge's own motion. N.C. Gen. Stat. §§ 7A-258, -259 (2007). Accordingly, because no order appears in the record on appeal to establish that Plaintiff's action had been transferred from the superior court division to the district court division, this Court's initial impression was that the district court had not obtained authority to dispose of this matter. *See Obo v. Steven B.*, — N.C. App. —, —, 687 S.E.2d 496, 500 (2009) (“[S]ubject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*.”).

Reluctant to dismiss the appeal and further prolong a matter which has been ongoing for more than eight years, this Court eventually, after several requests, obtained the court file from the Iredell County district court to determine how an action apparently originating in superior court came to be resolved in district court without an order to transfer. A careful review of documents in the district court file which were not made a part of the record on appeal revealed that Plaintiff's action was originally filed in district court and not in superior court as the caption on Plaintiff's complaint and the Division's answer thereto indicate. It appears that several of the pleadings in this case were erroneously captioned for the superior court division, although this matter remained in the district court at all times. Thus, through extensive efforts of this Court, we ascertained that Plaintiff's case originated and was therefore properly disposed of in district court, despite the contrary indication of the record on appeal.⁴ Having established that Plaintiff brought its breach of contract claim in district court, we now address the issues raised on this appeal regarding the disposition of this matter at the trial court level.

4. We admonish counsel for both parties to more carefully scrutinize preparation of the record on appeal so as not to waste this Court's energy and time. “Under North Carolina Rules of Appellate Procedure 7, 9, and 11, the burden is placed upon the appellant to commence settlement of the record on appeal[.]” *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006); *see also State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983) (“It is the appellant's duty and responsibility to see that the record is in proper form and complete.”).

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

C. Disposition of Plaintiff's Claim

In its complaint, Plaintiff alleged that at a 2 March 2006 hearing on the Division's motions to dismiss Bowles' counterclaims in the eleven dispositional matters,⁵ Assistant Attorney General Jeff Edwards opined that Plaintiff's claim for payment could only be brought as a separate lawsuit outside of N.C. Gen. Stat. § 20-108. Thus, Plaintiff believed that a separate action for breach of contract was necessary to preserve Plaintiff's rights, and Plaintiff accordingly filed the current breach of contract action against the Division.

On 31 December 2007, the Division filed a motion for summary judgment on Plaintiff's breach of contract claim. Iredell County District Court Judge Jimmy Myers entered an order on 5 February 2008 denying the Division's motion for summary judgment. On 19 May 2008, the matter came on for trial by a jury in Iredell County District Court, Judge Royster presiding. The evidence presented at trial tended to show the following:

In October 2000, Division Inspector Dan Lowrance ("Lowrance") contacted Thomas Bowles, Jr. ("Tommy") regarding Plaintiff's ability to assist the Division with towing and storage of motorcycles and component parts seized in the course of the Division's investigation. Tommy informed Lowrance that his company was capable of providing the requested services, and over the next several days, Plaintiff towed and began storage of twelve motorcycles and various motorcycle frames and parts. The motorcycles and parts were housed in a storage facility on Plaintiff's premises while their origins were investigated.

Within the first two weeks that the motorcycles and parts were being stored by Bowles, Tommy asked Lowrance how to complete the ten-day reports, which are used in these cases to establish a storage lien on the stored property. Lowrance instructed Tommy not to submit the ten-day reports in this instance because the volume of reports associated with this particular investigation would overwhelm the DMV in Raleigh.

In December 2000, about 30 days after most of the motorcycles had been placed in storage, Tommy asked the Division how he was going to be paid for Bowles' services. Through Lowrance, the Division informed Tommy that they did not know how Bowles would be

5. The Division's motions to dismiss Plaintiff's counterclaims in the dispositional matters are not contained in the record on appeal nor is a transcript of the hearing on those motions before this Court.

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

paid or how long the motorcycles would need to be stored because the theft case was pending in federal court. Over the next year, Tommy repeatedly contacted Lowrance and Inspector Scott Dayvault (“Dayvault”) from the Division, attempting to obtain information and instructions as to the status and disposition of the motorcycles and parts in Plaintiff’s storage facility. Tommy also inquired as to payment for the towing and storage and was informed by Lowrance that Lowrance was uncertain how Bowles would be paid.

The investigation and prosecution of the criminal matter regarding the stolen motorcycles and parts eventually spanned three and a half years, and involved the Division, the Federal Bureau of Investigation (“F.B.I.”), and the United States Attorney’s office. During the investigation and prosecution, Dayvault was told by the F.B.I. and the United States Attorney’s office not to release the motorcycles. Dayvault relayed this information to Tommy, and Bowles thus continued to store the vehicles for Defendant.

In early 2003, at the end of the Division’s involvement with the prosecution of the motorcycle thefts, Dayvault told Bowles that the criminal matter remained in federal court and that, in the future, Bowles should contact the Attorney General’s office for instructions regarding the motorcycles. Tommy contacted Assistant Attorney General Tracy Curtner (“Curtner”) and inquired about payment for his storage services. Tommy testified that after approximately 25 to 30 conversations with Curtner, it became clear to him that payment would not be arranged. Tommy expressed to Curtner that he would like to bring the Division, Plaintiff, and the Attorney General’s office before a judge to resolve the matter. Curtner informed Tommy that he could not sue the DMV, and that he would have to wait for the DMV to sue Bowles. Bowles would then be able to assert a counterclaim and pursue a lien remedy. On Curtner’s recommendation, Bowles retained counsel and waited to be sued by the Division. The Division eventually filed the aforementioned eleven dispositional actions against Bowles on 8 May 2004, and the subsequent events as detailed above ensued.

At the close of Plaintiff’s evidence, Defendant made a motion for directed verdict, which Judge Royster denied. Before the case was submitted to the jury, Defendant renewed its motion for directed verdict. Judge Royster partially granted the motion,⁶ finding there was

6. Although Judge Royster used the term “summary judgment” in granting Defendant’s motion for directed verdict as to the contract claim, it is apparent that he intended to rule on Defendant’s motion for directed verdict. “The standard of review

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

no contract between the parties, and particularly, there was no contract for storage of the motorcycles at a specific rate of \$15.00 per vehicle per day.⁷ However, Judge Royster left the issue of what constitutes reasonable compensation for the storage of the vehicles under N.C. Gen. Stat. § 20-108(j) for the jury to decide.

Judge Royster instructed the jury on the following issues: (1) whether Defendant did store the motorcycles and parts with Plaintiff, (2) whether Plaintiff stored the motorcycles and parts under such circumstances that Defendant should be required to pay for those services, and (3) to what amount of reasonable compensation, if any, was Plaintiff entitled. The jury found that Plaintiff did store the motorcycles and parts for Defendant under circumstances requiring Defendant to pay for such services, and that Plaintiff was entitled to \$575,725.00 in compensation. Defendant made a motion to remit or set aside the jury award and a motion for judgment notwithstanding the verdict, both of which were denied. On 23 June 2008, Judge Royster entered judgment upon the jury's verdict.

On 16 July 2008, Defendant filed its notice of appeal to this Court "from the Judgment in favor of the plaintiff[.]"

*II. Discussion**A. Defendant's Motion for Summary Judgment*

[1] Defendant first assigns error to the trial court's denial of its motion for summary judgment. However, Defendant has waived appellate review of this argument. Defendant gave notice of appeal to this Court "from the Judgment in favor of the plaintiff, entered on or about June 23rd, 2008[.]" Defendant failed to give notice of appeal from the order of the trial court entered 5 February 2008 denying its motion for summary judgment, and thus failed to comply with N.C. R. App. P. 3(d) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]"). Accordingly, Defendant's appeal from the trial court's denial of its motion for summary judgment is not properly before us. Defendant's argument is dismissed.

for a directed verdict is essentially the same as that for summary judgment." *Nelson v. Novant Health Triad Region, L.L.C.*, 159 N.C. App. 440, 442, 583 S.E.2d 415, 417 (2003). Thus, the trial court's *lapsus linguae* did not constitute prejudicial error.

7. Judge Royster ruled: "I will grant the partial directed verdict . . . that there wasn't an agreement by the defendant to pay fifteen dollars a day. I'm also . . . going to grant partial [directed verdict] as to the contract claim."

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

B. Defendant's Motions for Directed Verdict

[2] Defendant next argues the trial court erred in denying its motion for directed verdict at the close of Plaintiff's evidence, and in partially denying its renewed motion for directed verdict at the close of all the evidence. Our Supreme Court has set forth the appropriate standard of review as follows:

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions. N.C.G.S. § 1A-1, Rule 50(a), (b) (1990).

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations omitted).

At the close of Plaintiff's evidence, Defendant made a motion for directed verdict, arguing that no contract existed between the parties, and that Plaintiff's case is barred by the statute of limitations and sovereign immunity. At the close of all evidence, Defendant renewed its "motion for a directed verdict on the issue of the contract, whether or not there was a contract here." Defendant argued that there was no meeting of the minds and that there was no agreement for storage at a rate of \$15.00 per day. Defendant also renewed its defenses under the statute of limitations and sovereign immunity.

In discussing Defendant's motion for directed verdict, Judge Royster opined that while there was insufficient evidence to submit the issue of the existence of a contract under a common law contract theory to the jury, there was evidence that "there was a contract for storage [under N.C. Gen. Stat. § 20-108(j)], and [Plaintiff's] damages are going to be decided as what's reasonable, as required by 20-108 subparagraph (j)." Defense counsel further explained Defendant's motion for a directed verdict as follows:

What I—what I think or what I'm urging, I guess, is that the motion that there is a contract be denied [sic], but that doesn't

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

mean the state doesn't still owe money on—under 21-108 [sic], but it's something other than a—one—108 that is something other than a contract. That it is something that is mandated by the legislature, but it's not a contract.

Agreeing that “this is a statutorily created procedure[,]” the trial court granted Defendant’s motion for partial directed verdict, stating

I will grant the partial directed verdict— . . . the fact that that issue will not be submitted to the jury, that there wasn't an agreement by the defendant to pay fifteen dollars a day. I'm also . . . going to grant partial summary judgment [sic] as to the contract claim. And—but as to an action under 20-108 subparagraph (j), I'm going to let this proceed to the jury on that issue about what's a reasonable compensation for the storage of these vehicles.

On appeal, Defendant argues the trial court erred in denying its motions for directed verdict. As set out above, however, the trial court *granted* the motions Defendant made for directed verdict. Defendant did not move for a directed verdict on the issue of what compensation Plaintiff was entitled to under Section 20-108(j). After the trial court granted Defendant’s motions for directed verdict on the issues of the existence of a contract and an agreement for a specific storage cost of \$15.00 per day per motorcycle, the only issue that remained for the jury was what compensation, if any, Plaintiff was entitled to under N.C. Gen. Stat. § 20-108(j). As Defendant did not make a motion for a directed verdict on this issue, no appeal lies therefrom. Accordingly, Defendant’s argument is dismissed.

i. Defense of Sovereign Immunity

[3] Defendant also argues that it was entitled to a directed verdict because Bowles’ claim for recovery in *quantum meruit* was barred by sovereign immunity. Defendant’s argument is unnecessary, however, as Bowles conceded this issue at trial. In response to Defendant’s motion for directed verdict at the close of all evidence, Plaintiff’s counsel explained as follows: “We’ve talked about sovereign immunity. To the extent that there is a contract, sovereign immunity does not apply. We do agree, as indicated, that sovereign immunity would apply to a *quantum meruit* theory, and we are not advancing that as a theory.” Thus, the issue of whether Plaintiff was entitled to a recovery under a theory of *quantum meruit* is not before us.

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

Defendant argues further, however, that it was entitled to a directed verdict because N.C. Gen. Stat. § 20-108(j) does not operate as a waiver of sovereign immunity, and thus, that Plaintiff's recovery under section 20-108(j) is barred by sovereign immunity. Defendant has also waived appellate review of this issue. At trial, Defendant did not argue that Plaintiff's claim under N.C. Gen. Stat. § 20-108(j) was barred by sovereign immunity. In fact, Defendant acknowledged that the State may owe Plaintiff "money" under section 20-108(j). Specifically, defense counsel argued:

[W]hat I'm urging, I guess, is that the motion that there is a contract be denied [sic], but that doesn't mean the state doesn't still owe money on—under 21-108 [sic], but it's something other than a—one—108 that is something other than a contract. That lit is something that is mandated by the legislature, but it's not a contract.

Furthermore, on appeal, Defendant addresses the defense of sovereign immunity only as it applies to the denial of Defendant's motion for summary judgment, which we held above was not properly before us. Accordingly, Defendant has not preserved this argument for our review.⁸

C. Defendant's Motion to Set Aside or Remit Jury Verdict

[4] By its final argument, Defendant assigns error to the trial judge's denial of its motion to set aside or remit the jury verdict. Defendant argues the jury award of \$575,725.00 was excessive and was not "reasonable compensation" as contemplated under N.C. Gen. Stat. § 20-108(j). We disagree.

"[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). When reviewing a jury's award, the appellate courts will not interfere with the judge's discretion unless "the amount

8. In its brief on appeal, Defendant also states that Plaintiff's claim is barred by the statute of limitations. Defendant raised this defense in its answer and, at trial, defense counsel stated that he "would also like to continue to assert . . . everything in the pleadings, including sovereign immunity and also statute of limitations." However, Defendant has not argued the defense of the statute of limitations on appeal. Accordingly, Defendant has likewise waived review of this argument. N.C. R. App. P. 28(b)(6).

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

awarded is clearly or grossly excessive.” *Hulin v. W. Union Tel. Co.*, 185 N.C. 470, 472, 117 S.E. 588, 590 (1923).

ii. Duration of Storage

In arguing that the jury award was grossly excessive, Defendant contends it should be liable only for storage costs up to the filing date for the dispositional actions. In support of this contention, Defendant quotes *Thompson-Arthur Paving Co. v. Lincoln Battleground Assocs.*, 95 N.C. App. 270, 382 S.E.2d 817 (1989), for the proposition that damages are limited to the “reasonable value of materials and services accepted by and that benefit the defendant.” *Id.* at 281, 382 S.E.2d at 823. Remarkably, Defendant argues its benefit terminated at the filing date of the dispositional actions.

However, the facts reveal that the motorcycles and parts remained in storage at Plaintiff’s facility far beyond the filing date of the dispositional actions. Because there exists no evidence or explanation as to the difference in the manner of storage or benefit to Defendant before and after the filing date of the Division’s dispositional actions, we conclude that the storage costs accrued to Defendant beyond the filing date of such actions.

iii. Plaintiff’s Recovery Under N.C. Gen. Stat. § 20-108(j)

[5] Defendant next argues that section 20-108(j), and specifically the language entitling a storage company to “reasonable compensation as a claimant under (e),” limits Plaintiff’s recovery to the value of the parts and vehicles stored in Plaintiff’s facility.

N.C. Gen. Stat. § 20-108(j) provides that

[a]n officer taking into custody a motor vehicle or component part under the provisions of this section is authorized to obtain necessary removal and storage services, but shall incur no personal liability for such services. The person or company so employed shall be entitled to reasonable compensation as a claimant under (e), and shall not be deemed an unlawful possessor under (a).

N.C. Gen. Stat. § 20-108(e) provides that

[n]othing in this section shall preclude the Division of Motor Vehicles from returning a seized motor vehicle or component part to the owner following presentation of satisfactory evidence of ownership, and, if determined necessary, requiring the owner to

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

obtain an assignment of an identification number for the motor vehicle or component part from the Division of Motor Vehicles.

With no case law presented to support or undermine the Division's contention, we turn to the history of the statute to inform our interpretation of the statutory language. Before its amendment in 1983, section 20-108 read as follows:

Any person who knowingly buys, receives, disposes of, sells, offers for sale, conceals, or has in his possession any motor vehicle, or engine or transmission removed from a motor vehicle, from which the manufacturer's serial or engine number or other distinguishing number or identification mark or number placed thereon under assignment from the Division has been removed, defaced, covered, altered, or destroyed for the purpose of concealing or misrepresenting the identity of said motor vehicle or engine is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than one thousand dollars (\$1,000) or imprisonment, or both, in the discretion of the court.

N.C. Gen. Stat. § 20-108 (1978).

The committee notes discussing section 20-108 show that, prior to the amendment, the Division was storing abandoned vehicles with private garages at a charge to the State. 16 March 1983 *Minutes of the House Comm. on Highway Safety*. Because the Division was not selling the abandoned vehicles due to the lack of authority to do so, the costs of vehicle storage before 1983 were obviously unrelated to the sale value of the vehicle. While the purpose of the amendment was to curb the Division's storage costs by allowing the sale of abandoned vehicles to avoid payment of storage costs in perpetuity, nothing in the statute's history suggests that the storage costs incurred before sale would be limited to the proceeds from the public sale of the abandoned vehicles. *See id.* In fact, committee members stated that the revenue from the sale of such vehicles would go to the "public school fund of the State." 30 March 1983 *Minutes of the House Comm. on Highway Safety*. We conclude that the history and purpose of section 20-108 does not support Defendant's contention that storage fees must be limited to the value of the stored property.

Further, a logical reading of "reasonable compensation as a claimant under (e)" does not lead this Court to the conclusion that section 20-108(j) caps Plaintiff's recovery at the value of the motorcycles and parts. Although the language "as a claimant under (e)" raises the inference that the garage owners could claim for their fees

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

at the disposition hearings, this Court is unwilling, for the following reasons, to stretch that inference into a statutory interpretation whereby Plaintiff's entitlement to reasonable compensation is limited to the value of the vehicles and components stored. There is no mention of "claimants" in section 20-108(e), and it appears that subsection (e) does not reasonably relate to subsection (j).⁹ All other references to "claimants" in section 20-108 involve "claimants to the property whose interest or title is in the registration records in the Division of Motor Vehicles." N.C. Gen. Stat. § 20-108(c), (d), (f). In other words, claimants are those persons who can establish an ownership interest in the seized property. It seems obvious that garage owners who are storing seized property for the seizing entity do not qualify as "claimants" under the statutory definition.

Under the statute, claimants are entitled to notice that the property is in custody, notice of a post-seizure hearing, and a post-seizure hearing. *Id.* The fact that these claimants have a right to be heard before the vehicle is disposed of cannot be understood to limit a garage's storage fees to the value of the vehicle. We find the most logical interpretation of "reasonable compensation as a claimant under (e)" to be that when a towing and storage company has performed a service for the Division, that company has a claim to payment of the reasonable value of that service and has a right to be notified before the Division disposes of the vehicle in the event the company opts to accept title of the vehicle as payment for its service.

Defendant also argues that granting "claimant status" to garages employed by the Division limits recovery of storage fees because section 20-108 requires these garages to claim their fees through a lien remedy, which exists only up to the value of the property stored. *See* N.C. Gen. Stat. §§ 44A-2, 44A-4 (2007). Section 44A-2(d) grants a private garage authority to assert a possessory lien on stored property as follows:

9. Because subsection (j) references a "claimant under (e)," and because subsection (e) does not contain the term "claimant," we question whether the reference to (e) is a misprint. The 1983 amendment to N.C. Gen. Stat. § 20-108 was introduced to the General Assembly as House Bill 122. 1983 N.C. Sess. Laws ch. 592. The first draft of H.B. 122 had neither a subsection (j), nor any language from current subsection (j). *Id.* In the first draft, subsection (e) referred to notice of post-seizure hearing. *Id.* Between 30 March and 1 June 1983, H.B. 122 was redrafted into a committee substitute substantially similar to the current statute. 16, 30 March, 1 June 1983 *Minutes of the House Comm. on Highway Safety*. However, with no notes or minutes from which to ascertain exactly when (j) was added and precisely to what language or provision "as a claimant under (e)" was meant to refer, we have no instruction from the legislative history as to the meaning of that phrase.

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of the person's business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle, except for a motor vehicle seized pursuant to G.S. 20-28.3,^[10] has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, storing, or for the rental of one or more substitute vehicles provided during the repair, servicing, or storage. This lien shall have priority over perfected and unperfected security interests.

The North Carolina General Statutes contain numerous specific cross-references to Chapter 44A, including several such references in Chapter 20. *See, e.g.*, N.C. Gen. Stat. § 20-219.3(c) (2007) ("the registered owner of such vehicle shall become liable for the reasonable removal and storage charges and the vehicle subject to the storage lien created by G.S. 44A-1 et seq."); *see also* N.C. Gen. Stat. §§ 20-28.4, -52, -161, -219.10 (2007). Furthermore, Chapter 44A was in existence when section 20-108(j) was drafted. *See* N.C. Gen. Stat. § 44A-1, *et seq.* (1976); *see also* 1983 N.C. Sess. Laws ch. 592.

"In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws." *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998). Further, "[o]ne of the long-standing rules of [statutory] interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another." *Mangum v. Raleigh Bd. of Adjustment*, — N.C. App. —, —, 674 S.E.2d 742, 747 (2009). Applying such principle here, because the language of section 20-108(j) specifically references only section 20-108(e), that language cannot be construed as a reference to another statute not specifically mentioned, especially when the drafters were presumed to have been aware of that other statute. *See Mangum*, — N.C. App. at —, 674 S.E.2d at 747; *see also Hunt v. N.C. Reinsurance Facility*, 302 N.C. 274, 290, 275 S.E.2d 399, 407 (1981) (statute supplying one procedure for accomplishing an objective necessarily excludes any other procedure).

We therefore conclude that the Legislature did not intend for the person or company that stores a motor vehicle under N.C. Gen. Stat. § 20-108(j) to recover reasonable compensation for its services by way of lienor rights under N.C. Gen. Stat. § 44A-2(d). Ac-

10. N.C. Gen. Stat. § 20-28.3 (2007) provides for the seizure of a motor vehicle that is driven by a person who is charged with an offense involving impaired driving.

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

cordingly, we find that section 20-108(j) created a new remedy, separate from the Chapter 44A lien remedy, which entitles a private garage to reasonable compensation for services related to seizure under section 20-108.

This conclusion is further supported by the difference in the fundamental nature of the possessory interest under section 20-108 and under Chapter 44A. That is, under the lien statutes, the garage/possessor is holding the vehicle *against the rightful owner as security for payment* for services, whereas under the seizure statute, the garage/possessor is storing the vehicle *at the request of the Division in exchange for payment* for the requested storage. N.C. Gen. Stat. §§ 20-108, 44A-1, *et seq.* While Plaintiff may have enforced his lien on the property against Defendant when Defendant defaulted on its obligation to pay storage charges, we decline to hold that Plaintiff's sole method of recovery is through enforcement of its possessory lien. *See* N.C. Gen. Stat. § 44A-4(a) ("when property is placed in storage pursuant to an express contract of storage, . . . the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges"). Accordingly, we hold that the language in section 20-108(j) does not limit Plaintiff's recovery for unpaid storage costs to the value of the vehicles and parts stored.

Likewise, there is nothing in the statute or legislative history to indicate that the qualification of compensation as "reasonable" should tie the storage charge to the value of the vehicle. The legislative history is bare of any meaning associated with this term. With no legislative guidance for the reasonableness requirement, we decline to limit Plaintiff's right to an adequate recovery by overturning the jury's factual determination of damages and then labeling the trial judge's decision, made in his sound discretion, a substantial miscarriage of justice. In this case, we conclude that the judge correctly left for the jury the factual determination of reasonable compensation. We further conclude that the trial judge's decision not to set aside the jury verdict did not amount to an abuse of his discretion.

In affirming the trial judge's decision not to overturn the jury's verdict, we find enlightening the following discussion by our Supreme Court in *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), regarding the impact of its decision to allow the State to be held liable for breach of contract:

We do not apprehend that this decision will result in any unseemly conflict between the legislative and judicial branches of

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

the government. Nor do we anticipate that it will have a significant impact upon the State treasury or substantially affect official conduct. Past performance convinces us that when the State has entered into a contract, the officials who made it intended that the State would keep its part of the bargain. It has been the policy of this State to meet its valid obligations, and we foresee no change in that policy. The purpose of this decision is to implement the policy and to provide a remedy in exceptional situations where one may be required.

....

The State is liable only upon contracts authorized by law. When it enters into a contract it does so voluntarily and authorizes its liability. Furthermore, the State may, with a fair degree of accuracy, estimate the extent of its liability for a breach of contract. On the other hand, the State never authorizes a tort, and the extent of tort liability for wrongful death and personal injuries is never predictable. With no limits on liability jury verdicts could conceivably impose an unanticipated strain upon the State's budget.

Id. at 321-22, 222 S.E.2d at 424.

While the verdict herein could conceivably impose a strain upon this State's already tightened budget, we can hardly find this verdict to be an unanticipated one. In 2000, the Division and its officers entered into this agreement with Plaintiff voluntarily and as authorized by the General Assembly. While there was no specific agreement as to the price term of the contract, the State was put on notice by Plaintiff as to the cost of storage at its facility. At all times during this affair, State officials and officers were aware that hefty storage costs were mounting, yet did nothing to lessen the future burden on the State. That the officers did not know how the obligation would be fulfilled is of no moment. Of even less significance is the fact that the Division often hired businesses who performed the requested services at no cost to the State. Such testimony falls grimly short of evidencing a waiver of storage costs by Plaintiff. The evidence tends to show that the Division was accruing costs between October 2000 and May 2008 and, rather than removing the parts and vehicles from Plaintiff's storage facility, the Division, instead, apparently hoped it would simply be able to avoid its obligations in the end.

In its complaint, Bowles contends that in June 2004, when Bowles' eleven counterclaims in the Division's dispositional actions

BOWLES AUTO., INC. v. N.C. DIV. OF MOTOR VEHICLES

[203 N.C. App. 19 (2010)]

were filed, the lien remedy Bowles was seeking could have been satisfied by the \$50,000.00 estimated auction value for the motorcycles and parts in storage, at no cost to the Division. By contrast, Bowles alleges that the estimated storage fees as of June 2004 were already in excess of \$300,000.00. Bowles contends that following the Division's motions to dismiss Bowles' eleven counterclaims, filed 27 June 2004, the Division made no effort to retrieve the motorcycles from Bowles or to otherwise mitigate storage costs that continued to accrue daily. As of 6 January 2006, Bowles estimated the total storage costs at \$483,565.00, as well as additional payments for services rendered after that date based on a rate of \$15.00 per day per motorcycle or part. Despite these allegations, the Division left the motorcycles and parts in storage with Plaintiff.¹¹

At trial, Tommy testified that Bowles' standard towing rate in 2000 was \$50.00 per vehicle. Tommy also testified that Bowles' typical fee for outside storage was \$15.00 per part per day, and that Tommy had expressed to Lowrance that he would agree to that same rate for inside storage. Additionally, Wes Edmiston, the president of a vehicle towing and storage company in Troutman, North Carolina, testified on behalf of Bowles that in 2000 his company charged \$100.00 for towing a vehicle and \$15.00 per part per day for storage. Although Dayvault testified that he was not aware of Bowles' daily rate for storage, Dayvault admitted that as early as February 2001, he was aware that storage fees were accumulating rapidly.

While this Court is reluctant to render a decision which results in the people of North Carolina covering Plaintiff's more than half-

11. In a letter dated 24 October 2007, the Division offered to take possession of the motorcycles and parts, stating that such action "would not affect any liens [Bowles] has on the motorcycles." Prior to that date, the Division made no attempt to limit the costs that were accruing. When the Division finally attempted to mitigate the costs of storage, Bowles refused to relinquish possession of the motorcycles and parts unless its rights were "adequately protected." Bowles proposed that the Division pay the amount of the lien into court as a bond per N.C. Gen. Stat. § 44A-4(a) ("The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. . . . The clerk may at any time disburse to the lienor that portion of the cash bond, which the plaintiff says in his complaint is not in dispute, upon application of the lienor. The magistrate or judge shall direct appropriate disbursement of the disputed or undisbursed portion of the bond in the judgment of the court."). Bowles invited the Division to propose any other method it knew of that would protect Bowles' rights if the motorcycles and parts were released to the Division. As far as the record before this Court reflects, the Division never responded to Bowles' request. The Division's actions are puzzling at best, as an astounding portion of the costs that accrued while the motorcycles and parts remained in storage could have been avoided.

CAMPBELL v. DUKE UNIV. HEALTH SYS., INC.

[203 N.C. App. 37 (2010)]

million-dollar storage bill,¹² this Court is bound by the uncontroverted evidence that agents of this State ran up an eight-year tab at Plaintiff's expense and then, after a *de minimus* effort at best to mitigate costs, attempted to shirk its financial obligations.

Based on N.C. Gen. Stat. § 20-108(j) and the circumstances of this case, we hold that the trial judge did not abuse his discretion in denying Defendant's motion to set aside the jury verdict. Accordingly, the order of the trial court is

AFFIRMED.

CHIEF JUDGE MARTIN and JUDGE HUNTER, JR. concur.

BOBBY L. CAMPBELL, PLAINTIFF V. DUKE UNIVERSITY HEALTH SYSTEM, INC., CRITICAL HEALTH SYSTEMS OF NORTH CAROLINA, P.C., CRITICAL HEALTH SYSTEMS, INC., SOUTHEASTERN ORTHOPEDICS SPORTS MEDICINE AND SHOULDER CENTER, P.A., DONALD A. EDMONDSON, M.D., CYNTHIA KAEGER, CRNA, AND KEVIN P. SPEER, M.D., DEFENDANTS

No. COA09-581

(Filed 16 March 2010)

Medical Malpractice— Rule 9(j)—statement not supported by facts—summary judgment

The trial court did not err by granting summary judgment for defendants in a medical malpractice case where plaintiff's complaint facially complied with Rule 9(j), but discovery subsequently established that the expert statement was not supported by the facts.

Appeal by plaintiff from order entered 12 January 2009 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 28 October 2009.

12. We note that the jury's verdict is far less than it would have been if the jury had applied the \$15.00 per part per day rate to the 25 motorcycles and parts that were in Bowles' possession at the time of trial. Applying the \$15.00 rate for the storage of 25 motorcycles and parts over a period of seven and a half years equates to a storage fee of \$1,026,375.00. This sum excludes the towing costs which were incurred and is nevertheless almost double the jury's award of \$575,725.00.

CAMPBELL v. DUKE UNIV. HEALTH SYS., INC.

[203 N.C. App. 37 (2010)]

The Law Office of James M. Johnson, by James M. Johnson; and Brenton D. Adams, for plaintiff appellant.

McGuire Woods, LLP, by Mark E. Anderson, Claire A. Modlin and Monica E. Webb, for Critical Health Systems of North Carolina, P.C., Critical Health Systems, Inc., and Donald A. Edmondson, M.D., defendant appellees.

Crawford & Crawford, LLP, by Renee B. Crawford and Robert O. Crawford, III, for Southeastern Orthopedics and Kevin P. Speer, M.D., defendant-appellees.

HUNTER, JR., Robert N., Judge.

Bobby Campbell (“plaintiff”) appeals from the trial court’s order granting summary judgment in favor of Critical Health Systems of North Carolina, Inc., Critical Health Systems, Inc., Southeastern Orthopedics Sports Medicine and Shoulder Centers, P.A., Donald A. Edmondson, M.D., and Kevin P. Speer, M.D. (“defendants:”). After review, we hold, notwithstanding that plaintiff’s complaint facially complied with Rule 9(j) by including a statement that a medical expert qualified under Rule 702 would testify that defendants’ actions did not comply with the standard of care where discovery subsequently established that the statement was not supported by the facts, dismissal is appropriate. Accordingly, we affirm the trial court’s order.

I. FACTUAL BACKGROUND

On 25 November 2003, plaintiff suffered an injury to his right shoulder while working as a plumber at Cape Fear Valley Hospital in Fayetteville, North Carolina. An MRI showed that plaintiff sustained a large rotator tear as a result of his shoulder injury. On 16 December 2003, Dr. Bradley Broussard initially examined and diagnosed plaintiff with a combination of joint degenerative disease and rotator cuff tear to the right shoulder. Dr. Broussard injected plaintiff’s right shoulder with pain medication, but informed plaintiff that he would need to undergo surgery.

On 14 January 2004, defendant, Dr. Kevin P. Speer, an orthopedic surgeon employed by codefendant, Southeastern Orthopedics Sports Medicine and Shoulder Center, P.A., examined plaintiff’s right shoulder and concluded that he should undergo surgery. Dr. Speer performed a right shoulder arthroscopy and right open rotator cuff repair at Duke Raleigh Hospital on 9 February 2004. Defendant, Dr.

CAMPBELL v. DUKE UNIV. HEALTH SYS., INC.

[203 N.C. App. 37 (2010)]

Donald A. Edmondson, an anesthesiologist employed by codefendant, Critical Health Systems of North Carolina, P.C., served as the attending anesthesiologist during the surgical procedure. During the procedure, Dr. Edmondson and Dr. Speer were admittedly responsible for positioning, padding, and monitoring plaintiff's left arm.

At the beginning of the surgery, Dr. Edmondson and Dr. Speer placed plaintiff in the "beach chair" position. This position is the standard position used for many shoulder surgeries. In this position, the patient is placed in a semi-reclining, semi-sitting position with the patient's arms resting at either side and padded with various pads and foams to keep the patient in the position safely. There is no documentary evidence in Dr. Edmondson's records or any other record of whether or not plaintiff was properly padded and monitored during the procedure.

Plaintiff contends that he began to feel severe pain and numbness in his left arm, elbow, and fingers approximately one hour after surgery. During plaintiff's first follow up visit on 19 February 2004, after the initial 9 February 2004 surgery, Dr. Speer noted that plaintiff was doing well. Plaintiff first reported his painful condition to Dr. Speer on 1 April 2004, during a second follow-up visit. At that time, Dr. Speer noted that plaintiff was suffering from continued ulnar neuropathy¹ at his left elbow. An EMG confirmed the left elbow ulnar neuropathy and Dr. Speer performed subcutaneous nerve transfer on plaintiff's left elbow on 21 July 2004. Plaintiff continued to see Dr. Speer on a monthly basis after his surgery until he was discharged to a long term pain management clinic.

In his sworn affidavit, plaintiff avers that he did not experience pain or medical problems with his left arm prior to the 9 February 2004 surgery and that his ulnar nerve neuropathy was not pre-existing. After the 21 July 2004 surgery and to the present date, plaintiff contends that he experiences pain in his left arm on a daily basis and that his arm is permanently damaged.

On 8 February 2007, plaintiff filed a professional negligence claim alleging that his left arm was permanently damaged and injured due to defendants' failure to comply with the applicable standard of care when padding, positioning, and monitoring his left arm, wrist, and hand during the 9 February 2004 surgery to his right shoulder. Plain-

1. Ulnar neuropathy is an inflammation of the ulnar nerve, a major nerve that supplies movement and sensation to the arm and hand. Damage can cause numbness, tingling, or pain into the arm and hand on the side of the little finger.

CAMPBELL v. DUKE UNIV. HEALTH SYS., INC.

[203 N.C. App. 37 (2010)]

tiff's theory of the case is that the ulnar neuropathy in his left arm was caused by defendants' failure to properly monitor his arm during the operation. Because his injury was not pre-existing and he began to experience pain in his left arm one hour after the surgery, he contends that his arm became mis-positioned during the procedure resulting in his injury. Plaintiff does not rely on the doctrine of *res ipsa loquitur*.

On 2 November 2007, plaintiff named Dr. Jeffrey Cocozzo, an anesthesiologist practicing in Fort Lauderdale, Florida, as his expert witness who would testify pursuant to the heightened pleading requirements of N.C. R. Civ. P. 9(j) that defendants breached the applicable standard of care and proximately caused plaintiff's injuries. Defendants answered and denied the alleged negligence and injuries. A consent discovery order was entered by the trial court on 17 January 2008, pursuant to which plaintiff designated Dr. Cocozzo and defendant Speer as the intended expert witnesses for trial. On 10 December 2008, Dr. Cocozzo was deposed and gave the following sworn testimony regarding defendants' alleged negligence:

Q. . . . Do you believe that because Mr. Campbell sustained a nerve injury whose symptoms you believe first appeared post-operatively, do you believe because he sustained a nerve injury, negligence must have occurred?

A. Well, it's basically what he did say, right. He—he states that he did not have any nerve injury before and did end up having nerve injury during—during the surgery. So therefore that would be—that would be negligence, yes.

. . . .

Q. You're presuming that there was negligence based on the fact that there is an injury in this case; is that correct?

A. Yes.

Q. And you can't point to any specific incident that happened during the surgery that would have caused this injury, it's just based on your presumption of negligence because there was an injury at the end of the surgery; is that correct?

A. Right, right.

Q. And if Mr. Campbell did, in fact, have a pre-existing condition, then that doesn't mean there was anything that happened during the surgery that caused his injury; is that correct?

CAMPBELL v. DUKE UNIV. HEALTH SYS., INC.

[203 N.C. App. 37 (2010)]

- A. Right. If he had something that was a pre-condition and he already had an injury, then obviously he already had an injury.

....

- Q. Okay. And tell me, what is the basis of your opinion that improper positioning and/or padding resulted in damage to Mr. Campbell's ulnar nerve?

- A. Well, basically he—from—from what I know so far talking to him and looking at the records, his—I don't have any reason to believe that—that he didn't have a normal functioning before the surgery.

He went in for surgery that—where you can get a complication of having—from malpositioning of an ulnar nerve injury and within a day or so after the surgery he seemed to have—started having complaints of ulnar nerve injury.

Dr. Speer and Dr. Edmondson both contend that plaintiff was properly padded, positioned, and monitored during surgery solely because it is their custom to do so during shoulder surgery. However, Dr. Edmondson admitted that he had no independent recollection of plaintiff's surgery or what he did or did not do during plaintiff's surgery.

On 22 December 2008, defendants Dr. Speer and Southeastern Orthopedics Sports Medicine and Shoulder Center, P.A., filed motions for summary judgment on the basis that the affidavit and testimony of Dr. Cocozzo show that “(1) there is no evidence from a qualified expert that Dr. Speer's care was not in accordance with the applicable standards of care and (2) that no act or omission of Dr. Speer was a proximate cause of the plaintiff's alleged injury.” Subsequently, on 23 December 2008, defendants Critical Health Systems of North Carolina, P.C., Critical Health Systems, Inc., and Donald A. Edmondson, M.D., filed a motion for summary judgment based on a contention that there is no genuine issue of material fact with regard to “whether any actions or inactions of [the] [d]efendants were the proximate cause of [p]laintiff's alleged injury.” The trial court granted both the 22 and 23 December 2008 motions for summary judgment and cited to *Kenyon v. Gehrig*, 183 N.C. App. 455, 459, 645 S.E.2d 125, 128 (2007), *disc. review denied*, 362 N.C. 176, 658 S.E.2d 272 (2008), as the basis for the decision (holding that where “plaintiff's expert witnesses based their opinions only on the fact of the injury itself; their assignation of negligence on defendants' part constituted mere

CAMPBELL v. DUKE UNIV. HEALTH SYS., INC.

[203 N.C. App. 37 (2010)]

speculation” and is insufficient to withstand a motion for summary judgment). Plaintiff appeals.

II. STANDARD OF REVIEW

Summary judgment is properly granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). When reviewing a trial court’s grant of a motion for summary judgment, the standard of review is whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Smith v. Harris*, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007). “An appeal from an order granting summary judgment raises only the issues of whether, on the face of the record, there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law.” *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 353, 595 S.E.2d 778, 782 (2004). We review a trial court’s ruling on summary judgment de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

III. ANALYSIS

N.C. R. Civ. P. 9(j) provides, in pertinent part:

Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

- (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
- (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

CAMPBELL v. DUKE UNIV. HEALTH SYS., INC.

[203 N.C. App. 37 (2010)]

- (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2007). In *Barringer v. Forsyth County Wake Forest University Baptist Medical Center*, our Court set forth the following principles for reviewing a party's compliance with Rule 9(j) in medical malpractice actions:

Rule 9(j) unambiguously requires a trial court to dismiss a complaint if the complaint's allegations do not facially comply with the rule's heightened pleading requirements. Additionally, this Court has determined "that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." In considering whether a plaintiff's Rule 9(j) statement is supported by the facts, "[a] court must consider the facts relevant to Rule 9(j) and apply the law to them." In such a case, this Court does not "inquire as to whether there was any question of material fact," nor do we "view the evidence in the light most favorable" to the plaintiff. Rather, " 'our review of Rule 9(j) compliance is *de novo*, because such compliance clearly presents a question of law. . . . ' "

— N.C. App. —, —, 677 S.E.2d 465, 477 (2009) (citations omitted).

In the present case, plaintiff contends that there are sufficient facts to raise genuine issues of fact as to the following: (1) defendants' negligence while caring for plaintiff; (2) whether plaintiff suffered from a pre-existing ulnar nerve neuropathy; and (3) whether plaintiff's left arm was padded and positioned in accordance with the standard of care for rotator cuff surgery. Plaintiff's evidence included the affidavit from, and expert testimony of, Dr. Cocozzo; however, his testimony failed to specifically assert that defendants' actions were the proximate cause of the injuries to plaintiff's left arm, wrist, and hand. Moreover, plaintiff, in his reply brief, specifically argues direct evidence medical malpractice negligence and rejects any application of the doctrine of *res ipsa loquitur*.

Plaintiff likely rejects the application of *res ipsa loquitur* because our Courts are reluctant to apply the doctrine in medical malpractice cases, and further, plaintiff does not meet the first prong to invoke the doctrine, as Dr. Cocozzo admitted that ulnar neuropathy can be a complication of shoulder surgery. See *Kenyon*, 183 N.C. App. at 460, 645 S.E.2d at 128-29 (stating that *res ipsa loquitur*

CAMPBELL v. DUKE UNIV. HEALTH SYS., INC.

[203 N.C. App. 37 (2010)]

allows the fact finder to draw an inference of negligence from the circumstances surrounding the injury when

(1) “the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission,” (2) “direct proof of the cause of [the] injury is not available,” and (3) “the instrumentality involved in the accident is under the defendant’s control.”

....

[Moreover], [t]o allow the jury to infer negligence merely from an unfavorable response to treatment would be tantamount to imposing strict liability on health care providers.

Id. (citations omitted).

In order to survive a summary judgment motion in a direct evidence medical malpractice case, plaintiff is required to forecast evidence demonstrating the existence of a *prima facie* case of negligence, one element of which is causation. The evidence of causation in a medical negligence case “must be probable, not merely a remote possibility.” *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988) (citation omitted). Courts rely on expert testimony to show medical causation because “the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen[.]” *Click v. Pilot Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). With regard to this issue, our Supreme Court in *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000), further explains that

when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman’s opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. Indeed, this Court has specifically held that “an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.”

(citation omitted). Moreover, in *Schaffner v. Cumberland County Hosp. System*, our Court held that “ordinarily negligence must be proved and cannot be inferred from the fact of an injury[.]” 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985).

As plaintiff argues direct negligence, we only find it necessary to address whether plaintiff’s facts raise a genuine issue of fact as to

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

whether defendants proximately caused plaintiff's injuries by breaching the standard of care while padding and positioning plaintiff during surgery. Here, Dr. Cocozzo's testimony constitutes mere speculation as to the proximate cause of plaintiff's injuries. For instance, as provided above, during the deposition Dr. Cocozzo testified that he is unable to point to any specific incident or action of any defendant during plaintiff's 9 February 2004 surgery that would have caused plaintiff's injuries. Furthermore, Dr. Cocozzo admits that he presumes defendants were negligent because plaintiff sustained an injury.

Although plaintiff alleged in his complaint that defendants were negligent in padding, positioning, and monitoring his left arm during the 9 February 2004 surgery of his right shoulder, plaintiff's expert does not connect any action or inaction of defendants to the injuries sustained. In fact, the only evidence plaintiff is able to provide in support of his negligence claim is the fact of his injury, and unfortunately, his injury is not the sort that would allow an average juror to determine negligence in the absence of expert testimony. Accordingly, as plaintiff is unable to present a forecast of evidence showing the existence of a genuine issue of material fact, we must affirm the trial court's order of summary judgment as to all defendants.

Affirmed.

Judges ELMORE and STEELMAN concur.

LAWRENCE A. WILSON, III AND LEIGH M. WILSON, PLAINTIFFS V. LAWRENCE A. WILSON, SR., INDIVIDUALLY AND IN HIS CAPACITY AS TRUSTEE OF THE LAWRENCE ALLAN WILSON, JR. TRUST FOR THE BENEFIT OF LAWRENCE ALLAN WILSON, III AND THE LAWRENCE ALLAN WILSON, JR., TRUST FOR THE BENEFIT OF LEIGH MEREDITH WILSON, AND LAWRENCE A. WILSON, JR., DEFENDANTS

No. COA09-325

(Filed 16 March 2010)

1. Appeal and Error—interlocutory order—ineffective initial appeal—subsequent final judgment

Plaintiffs' appeal of a protective order as well as an order for summary judgment was properly before the Court of Appeals. Although the initial appeal from the protective order was not immediately appealable, the order granting defendants sum-

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

mary judgment was a final judgment. Thereafter, plaintiffs could timely appeal.

2. Trusts— accounting—information reasonably necessary to enforce rights

The trial court erred by granting a protective order in favor of defendants that effectively denied plaintiffs' request for an accounting of the pertinent trusts even though a provision of the trust instrument purportedly excused the trustee from providing an accounting. N.C.G.S. § 36C-8-813 does not override the duty of the trustee to act in good faith, nor can it obstruct the power of the court to take such action as may be necessary in the interests of justice. The trial court's grant of summary judgment and award of costs to defendants was reversed.

Judge ELMORE dissenting.

Appeal by Plaintiffs from orders entered 25 August 2008 by Judge Phyllis M. Gorham and 13 January 2009 by Judge Jay D. Hockenbury in Superior Court, New Hanover County. Heard in the Court of Appeals 29 September 2009.

Ward and Smith, P.A., by John M. Martin, for plaintiffs-appellants.

Shipman & Wright, L.L.P., by Gary K. Shipman and Catherine H. Lesica, for defendants-appellees.

WYNN, Judge.

"[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust."¹ In the present case, the trial court held that Defendant-settlor Lawrence A. Wilson, Jr. could, by a provision in the trust instrument, deny Plaintiffs-beneficiaries information necessary to prevent or redress a breach of trust. Because this result is contrary to law, we reverse the trial court's grant of a protective order and summary judgment to Defendants.

Defendant Lawrence A. Wilson, Jr. in 1992 created two irrevocable trusts, one for each of his two children. He made Defendant Lawrence A. Wilson, Sr. the trustee for both of the trusts, and included in both instruments the provision at issue in this case:

1. *Taylor v. Nationsbank Corp.*, 125 N.C. App. 515, 521, 481 S.E.2d 358, 362 (1997) (quoting Restatement (Second) of Trusts § 173 cmt. c (1959)).

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

The Trustee shall not be required by any law, rule or regulation to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary, but he may from time to time present his accounts to an adult beneficiary or a parent or guardian of a minor or incompetent beneficiary.

On 28 September 2007, the beneficiaries (“Plaintiffs”) filed suit, alleging a breach of fiduciary duty. Plaintiffs requested, among other things, that the trustee be required “to provide a full, complete, and accurate accounting of the Trusts from December 31, 1992 through the date on which the Order is entered.” In support of their claims, Plaintiffs alleged that Defendant Trustee Wilson, Sr. had allowed Defendant Settlor Wilson, Jr. to take control of the assets of the Trusts, and that Defendant Settlor Wilson, Jr. subsequently invested the assets in his personal business ventures which were highly speculative and resulted in a substantial depreciation of assets. Plaintiffs further alleged that Defendant Trustee breached his statutory duty by failing to distribute income to Plaintiffs as required by the terms of the Trust Instruments.

Defendants filed an answer on 30 October 2007 pointing to the provision of the trust instruments that purportedly excused the trustee from providing an accounting.² In response to requests for discovery regarding the trust, Defendants replied consistently that the request:

stands as an attempt to obtain information in the nature of inventories, appraisals, reports or accounts which, pursuant to the provisions of the Trust Instrument are not required to be provided “any court or any beneficiary” and that the beneficiary may not seek through litigation or discovery to obtain that to which he/she is not otherwise entitled pursuant to the provisions of the Trust Instrument.

Defendants filed a motion for a protective order on 14 March 2008 “on the grounds that by reason of the provisions of the Trust Instrument, the discovery sought herein may not be had.” The motion requested a ruling on Defendants’ prior motion for declaratory judgment.

2. The pleading was styled “Answer, Affirmative Defenses, Third Party Complaint and Motion.” The Third Party Complaint was dismissed 25 July 2008 and is not at issue here. Defendants amended their responsive pleading on 7 November 2007 to include a counterclaim requesting declaratory judgment on the issue of Defendants’ obligations under the Trust.

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

ment to determine the beneficiaries' right to demand an accounting. Plaintiffs' counsel filed an affidavit stating that Plaintiffs were totally unable to oppose Defendants' motion "[a]s a result of the refusal of the Defendants to fully and completely answer and respond to the Plaintiffs' discovery." A hearing was held 7 April 2008 on Defendants' motion. The trial court subsequently issued an order granting Defendants' motion for a protective order and partial declaratory judgment. The trial court included in its findings of fact that:

13. Under the North Carolina Uniform Trust Code ("NCTC"), no aspect of a Trustee's duty to inform beneficiaries is mandatory. (*See*, N.C. Gen. Stat. § 36C-1-105). The legislative commentary to N.C. Gen. Stat. § 36C-8-813 supports the conclusion that a settlor, in this case Defendant Settlor Wilson, Jr., may override, or negate, the requirement of disclosure to the Beneficiary Plaintiffs in this matter by drafting a provision in the Trust Instrument providing that such disclosures are not required. *Id.*

14. The Defendant Settlor Wilson, Jr. has done precisely this.

15. By reason of the operation of Article 2.10 of the Wilson Trust Instrument, and considered in view of N.C. Gen. Stat. § 36C-1-105, Plaintiffs are not entitled to have Defendants provide them with the information they seek in discovery or give an accounting or make reports with any Court or to the Plaintiffs/Beneficiaries.

The trial court included in its conclusions of law that:

2. The disclosure and trust accounting provisions in N.C. Gen. Stat. § 36C-8-813 apply to all trustees unless the same are negated, or over-ridden by the express provisions of the trust instrument themselves. *See*, N.C. Gen. Stat. § 36C-1-105 *et seq.*

....

4. By reason of the operation of the Trust Instrument, and considered in view of N.C. Gen. Stat. § 36C-1-105, the Plaintiffs are not entitled to have the Defendants give an accounting or make reports with any Court or to the Plaintiffs/Beneficiaries, and are accordingly, not required to provide the information sought by the Plaintiffs in discovery.

5. The Wilson Trust Instrument eliminates the requirement that Trustee Defendant Wilson, Sr., provide trust accounting information of the nature and type requested by Plaintiffs, as Article 2.10 of the Wilson Trust Instrument does not require such disclosure.

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

Plaintiffs filed notice to appeal the order to this Court on 18 September 2008, but no record was filed and the appeal was never docketed. On 22 October 2008 Defendants filed a motion for summary judgment. That motion stated “Plaintiffs have admitted that they cannot support the allegations contained in their Second and Third Claims for Relief without the accounting sought in their First Claim for Relief.” The trial court granted Defendants’ motion for summary judgment on 12 January 2009.

Plaintiffs now appeal the trial court’s orders on Defendants’ motion for a protective order and partial declaratory judgment, and summary judgment and the award of costs to Defendants.

I.

[1] As an initial matter, we must determine the extent to which this Court may consider Plaintiffs’ appeal. Defendants argue that this Court may not hear Plaintiffs’ appeal regarding the protective order and partial declaratory judgment as Plaintiffs’ first appeal of that order was (1) interlocutory and (2) Plaintiffs failed to perfect that appeal. Neither of these bases supports Defendants’ position.

Both parties agree that Plaintiffs’ appeal of the protective order was interlocutory when it was first filed. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (“An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.”). Interlocutory orders are generally not immediately appealable to this Court. *Hudson-Cole Dev. Corp. v. Beemner*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). An exception to this rule exists, however, where the challenged order affects a substantial right that would be lost without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 261 (2001).

Defendants argue—and we agree—that the appeal sought from the protective order did not affect a substantial right. *See Dworsky v. Insurance Co.*, 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980) (“It has been held that orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right”). The appeal was therefore not immediately appealable when Plaintiffs first filed notice of appeal.

It does not follow, however, that it must be dismissed now. Indeed, a party’s “rights . . . are fully and adequately protected by an exception to the order which may then be assigned as error on ap-

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

peal should final judgment in the case ultimately go against it.” *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978). The order granting Defendants summary judgment is a final judgment. Thus Plaintiffs’ present appeal of the protective order is not interlocutory.

Defendants also argue that this Court may not hear Plaintiffs’ appeal of the protective order because Plaintiffs failed to file the record and docket the case when the appeal was initially taken. This argument misconstrues our precedent.

McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980), and *Woods v. Shelton*, 93 N.C. App. 649, 379 S.E.2d 45 (1989), established the rule that a party’s “failure to timely perfect [an] appeal constitutes an abandonment of the appeal.” *Woods*, 93 N.C. App. at 652, 379 S.E.2d at 47. The operative word here is *timely*. As we have recognized above, Plaintiffs could timely file appeal of the protective order only after a final judgment had been rendered. Plaintiffs’ aborted attempt to file an interlocutory appeal does not estop them from filing an appeal at the appropriate time.

Defendants acknowledge that the order for summary judgment was a final judgment and properly appealed. The validity of the prior protective order is involved in that judgment, as this Court could not meaningfully review the order for summary judgment without also reviewing the grounds upon which it is based. Consequently, Plaintiffs’ appeal of the protective order as well as the order for summary judgment is properly before this Court.

II.

[2] Plaintiffs argue that the trial court erred in granting Defendants’ protective order and partial declaratory judgment and in granting Defendants’ motion for summary judgment. Summary judgment is proper when a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009); *Integon Indem. Corp. v. Universal Underwriters Ins. Co.*, 131 N.C. App. 267, 270, 507 S.E.2d 66, 68 (1998). “[O]n review of a declaratory judgment action, we apply the standards used when reviewing a trial court’s determination of a motion for summary judgment.” *Hejl v. Hood, Hargett & Associates, Inc.*, — N.C. App. —, —, 674 S.E.2d 425, 427-28 (2009). “We review a trial court’s order for summary judgment de novo to determine . . . whether either party is ‘entitled to judgment as a matter of law.’” *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)).

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

The basic issue here is whether the trial court erred in its interpretation of the North Carolina Uniform Trust Code (“N.C. Trust Code”). The N.C. Trust Code “applies to any express trust, private or charitable, with additions to the trust, wherever and however created.” N.C. Gen. Stat. § 36C-1-102 (2009). Section 36C-1-105 provides:

(b) The terms of a trust prevail over any provision of this Chapter except:

....

(2) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

....

(9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.

N.C. Gen. Stat. § 36C-1-105 (2009). The N.C. Trust Code thus recognizes that a trustee has a mandatory duty to act in good faith and that the terms of the trust cannot prevail over the power of the court to act in the interests of justice. The N.C. Trust Code also recognizes that a trustee generally has a duty to account for the trust property to the beneficiaries. Section 36C-8-813 provides:

a) The trustee is under a duty to do all of the following:

(1) Provide reasonably complete and accurate information as to the nature and amount of the trust property, at reasonable intervals, to any qualified beneficiary who is a distributee or permissible distributee of trust income or principal.

(2) In response to a reasonable request of any qualified beneficiary:

a. Provide a copy of the trust instrument.

b. Provide reasonably complete and accurate information as to the nature and amount of the trust property.

c. Allow reasonable inspections of the subject matter of the trust and the accounts and other documents relating to the trust.

N.C. Gen. Stat. § 36C-8-813 (2009).³

3. “Qualified beneficiary” is defined at N.C. Gen. Stat. § 36C-1-103(15). Defendants do not argue on appeal that Plaintiffs are not qualified beneficiaries.

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

The North Carolina Commentary on this statute explains that “[t]his section departs significantly from the Uniform Trust Code.” N.C. Gen. Stat. § 36C-8-813 North Carolina Commentary (2009). The commentary goes on to state that the drafters omitted those portions of the Uniform Trust Code that would require the trustee to keep qualified beneficiaries reasonably informed about the trust administration. The drafters instead inserted the rule from section 173 of the Restatement (Second) of Trusts (1959) requiring the trustees to give beneficiaries certain information upon request and to permit the beneficiaries to inspect trust documents. This is not, however, listed as a mandatory rule that prevails over the terms of the trust instrument. *See* N.C. Gen. Stat. § 36C-1-105. The commentary concludes from this that:

The settlor is free to override the provisions of subsections (a) and (b) regarding the information to be furnished to the beneficiaries by directing the trustee not to provide a beneficiary with any of the information otherwise required. This approach is consistent with the statement in the *Taylor* decision [*Taylor v. Nationsbank Corp.*, 125 N.C. App. 515, 481 S.E.2d 358 (1997)] where the court said that “trust beneficiaries are entitled to view the trust instrument from which their interest is derived” so long as that right is not waived by the settlor through “an explicit provision in the trust instrument to the contrary”. The mandatory rules in Section 105(b)(8) and (9) of the Uniform Trust Code would have prevented a settlor from overriding the provisions of Section 813(a) and (b)(2) and (3) of the Uniform Trust Code. The drafters omitted these mandatory rules and decided not to apply any such rule to the provisions of subsections (a) and (b) of this section. *See* the North Carolina Comment to G.S. 36C-1-105.

N.C. Gen. Stat. § 36C-8-813 North Carolina Commentary (2009). The North Carolina Comment to section 36-1-105 elaborates on the drafter’s decision:

Whether and to what extent the settlor by the terms of the trust could prevent a beneficiary from receiving trust information was one of the more debatable issues of the Uniform Trust Code. The drafters concluded that in North Carolina the settlor should have the right to override any duty to furnish information imposed by G.S. 36C-8-813(a) and (b). Accordingly, the drafters decided not to impose a mandatory rule with respect to these provisions. This is consistent with the statement in *Taylor v. NationsBank*, 125 N.C. App. 515, 521, 481 S.E.2d 358, 362 (1997) where the court

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

said that “trust beneficiaries are entitled to view the trust instrument from which their interest is derived” so long as that right is not waived by the settlor through “an explicit provision in the trust to the contrary.”

N.C. Gen. Stat. § 36-1-105 North Carolina Commentary (2009).

In ruling on Defendants’ request for a protective order, the trial court found that “[t]he legislative commentary to N.C. Gen. Stat. § 36C-8-813 supports the conclusion that a settlor . . . may override, or negate, the requirement of disclosure to the Beneficiary . . . by drafting a provision in the Trust Instrument providing that such disclosures are not required.” In ruling on Defendants’ motion for summary judgment, another trial court relied on this legal conclusion. The validity of this conclusion with regard to Plaintiffs’ request for discovery is now at issue.

The N.C. Trust Code commentary cites *Taylor v. NationsBank* as supporting the assertion that the settlor is free to override the provisions of § 36C-8-813 regarding a trustee’s duty to provide trust information to the beneficiary. See N.C. Gen. Stat. § 36C-8-813 North Carolina Commentary (2009). It is true that *Taylor* held “that absent an explicit provision in the trust to the contrary, plaintiffs as trust beneficiaries are entitled to view the trust instrument from which their interest is derived.” *Taylor*, 125 N.C. App. at 521, 481 S.E.2d at 362. But this holding by its terms applies only to the beneficiaries’ entitlement to view *the trust instrument*.

Taylor reached this result by applying the rule in comment c of section 173 of the Restatement (Second) of Trusts: “the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.” *Id.* The *Taylor* Court held that the information plaintiffs sought, namely documents relating to the trust instrument including prior revoked drafts of the trust, was not reasonably necessary to enforce the plaintiffs rights. *Id.* Such is not the case here.

Applying the same rule to the present circumstances, we conclude that the information sought by Plaintiffs is reasonably necessary to enable them to enforce their rights under the trust. N.C. Gen. Stat. § 36C-8-813 does not override the duty of the trustee to act in good faith, nor can it obstruct the power of the court to take such action as may be necessary in the interests of justice. N.C. Gen. Stat. § 36C-1-105(b)(2), (9) (2009). Such action would clearly encompass

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

the power of the court to compel discovery where necessary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust, any contrary provision in the trust instrument notwithstanding. *See Wachovia Bank v. Willis*, 118 N.C. App. 144, 147, 454 S.E.2d 293, 295 (1995) ("It is a fundamental rule that, when interpreting wills and trust instruments, courts must give effect to the intent of the testator or settlor, *so long as such intent does not conflict with the demands of law and public policy.*") (emphasis added).

This result, required by the rule in *Taylor*, is consistent with how other jurisdictions have approached this question. "Any notion of a trust without accountability is a contradiction in terms." *Guardianship and Conservatorship of Sim*, 403 N.W.2d 721, 736 (Neb. 1987), *appeal dismissed, Sim v. Comiskey*, 484 U.S. 940, 98 L. Ed. 2d 351 (1987). As the Oregon Supreme Court stated:

If a fiduciary can be rendered free from the duty of informing the beneficiary concerning matters of which he is entitled to know, and if he can also be made immune from liability resulting from his breach of the trust, equity has been rendered impotent. The present instance would be a humiliating example of the helplessness into which courts could be cast if a provision, placed in a trust instrument through a settlor's mistaken confidence in a trustee, could relieve the latter of a duty to account. Such a provision would be virtually a license to the trustee to convert the fund to his own use and thereby terminate the trust.

....

... We are, however, prepared to adopt the point of view of the Restatement that a trust instrument may lawfully relieve a trustee from the necessity of keeping formal accounts. When such a provision is found in a trust instrument, a beneficiary can not expect to receive reports concerning the trust estate. *But even when such a provision is made a part of the trust instrument, the trustee will, nevertheless, be required in a suit for an accounting to show that he faithfully performed his duty and will be liable to whatever remedies may be appropriate if he was unfaithful to his trust.*

Wood v. Honeyman, 169 P.2d 131, 164-66 (Or. 1946) (emphasis added).

In this case, we hold that the trial court erred by relying on the commentary to our statutes, which is not binding. *See State v. Rupe*,

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

109 N.C. App. 601, 613-14, 428 S.E.2d 480, 488 (1993). Applying the rule in *Taylor*, we hold that the information sought by Plaintiffs was reasonably necessary to enforce their rights under the trust, and therefore could not legally be withheld, notwithstanding the terms of the trust instrument. Any other conclusion renders the trust unenforceable by those it was meant to benefit. We therefore reverse the trial court's grant of summary judgment and award of costs to Defendants. See *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 224, 488 S.E.2d 845, 852, *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997) (reversing the taxing of costs to respondents where costs were imposed in consequence of the trial court's erroneous decision on the merits).

Reversed.

Judge CALABRIA concurs

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

Although I agree with the majority that principles of equity support the transparency of dealings by a trustee with the funds entrusted to him, I also believe that North Carolina law permits private parties to create trust instruments such as those at issue here. I also believe that plaintiffs never perfected their appeal as to the protective order in this case, thus depriving this Court of jurisdiction over that matter. As such, I respectfully dissent.

In 1992, Lawrence A. Wilson, Jr. (defendant Wilson, Jr.), established two irrevocable trusts for each of his two children, Lawrence A. Wilson, III, and Leigh M. Wilson (plaintiffs). The trust instruments creating the two trusts were identical; each named as trustee Lawrence A. Wilson, Sr. (defendant Wilson, Sr.), and each contained the following clause:

The Trustee shall not be required by any law, rule or regulation to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary, but he may from time to time present his accounts to an adult beneficiary or a parent or guardian of a minor or incompetent beneficiary.

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

In March 2007, plaintiffs' attorney contacted defendant Wilson, Sr., to request an accounting of the trust. To that date, no distribution of trust income had been made to plaintiffs. In July 2007, defendant Wilson, Sr., provided a breakdown that, per plaintiffs, showed that many of the assets in the trust had been liquidated and transferred or invested in companies owned by defendant Wilson, Sr.

On 28 September 2007, plaintiffs initiated this suit, alleging breach of fiduciary duty by defendant Wilson, Sr., and requesting, among other things, a full and complete accounting of the trust assets and investments. On 7 November 2007, defendants filed complaints containing counterclaims and a motion for declaratory judgment regarding their obligations to provide responses to discovery in light of the provisions of the trust instruments. After several rounds of interrogatories and requests for production of documents, on 14 March 2008, defendants filed a motion for a protective order on the grounds that the trust instrument negated their obligations to provide such information. On 25 August 2008, the trial court entered an order granting defendants' motions for a protective order and for partial declaratory judgment; specifically, in that order, the trial court held that plaintiffs need not provide requested information to defendants based on the terms of the trust instrument. Plaintiffs filed notice of appeal regarding this order on 18 September 2008.

On 22 October 2008, defendants filed a motion for summary judgment. That motion was granted by the trial court by an order entered 13 January 2009. Plaintiffs filed notice of appeal regarding this order on 26 January 2009.

Thus, two orders are at issue here: First is the order granting the motion for partial declaratory judgment and a protective order, entered on 25 August 2008; second is the summary judgment order, entered on 26 January 2009.

As to the first, as mentioned, plaintiffs entered notice of appeal on 18 September 2008; however, at no time did they file a record for that case with this Court. This omission constitutes a failure to perfect their appeal on this order, and, as such, this Court should not hear arguments on that order. N.C. R. App. Proc. 11, 12 (2009); see *McGinnis v. McGinnis*, 44 N.C. App. 381, 386-87, 261 S.E.2d 491, 494-95 (1980); *Woods v. Shelton*, 93 N.C. App. 649, 652-53, 379 S.E.2d 45, 46-47 (1989).

The majority states that *McGinnis* and *Woods* do not prevent this Court from hearing arguments on the protective order because no

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

issue of timeliness exists regarding plaintiffs' filing of their appeal. My concern, however, is not with the timeliness of their filing; rather, it is with their failure to perfect the appeal at all, regardless of timing. While it is true that "[p]laintiffs' aborted attempt to file an interlocutory appeal does not estop them from filing an appeal at the appropriate time[.]" this does not negate the fact that plaintiffs initiated an appeal on that order, then never filed a record in support of it. This Court should not now allow plaintiffs to state that the record before us in this case, related to the appeal of a separate order, is also in support of a separate former appeal. Nor does the fact that that order is closely related to the summary judgment properly before us bestow upon us the authority to consider the validity of that former order.

Plaintiffs did perfect their appeal as to the second order. As to it, plaintiffs argue that the trial court erred in granting summary judgment to defendants because two genuine issues of material fact existed—namely, the alleged breach of fiduciary duty by defendant Wilson, Sr., and the distribution by defendant Wilson, Sr., of the income of the trusts.

In its order granting summary judgment to defendants, the trial court cited the following sources that informed its ruling: the 25 August 2008 order by the Honorable Phyllis Gorham; from defendants, discovery responses from plaintiffs and a memorandum of law in support of the motion; from plaintiffs, an affidavit from John M. Martin; and arguments from both defendants and plaintiffs.

The 25 August 2008 order is the order mentioned above ruling on defendants' motion for protective order and partial declaratory judgment. In that order, the court noted the following language (quoted above) from the trust instruments at issue:

The Trustee shall not be required by any law, rule or regulation to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary, but he may from time to time present his accounts to an adult beneficiary or a parent or guardian of a minor or incompetent beneficiary.

It also made the following findings of fact:

11. Pursuant to Article 2.10[of the Trust Instruments], the Trustee is not required to disclose the information sought by Plaintiffs in discovery.

* * *

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

13. Under the North Carolina Uniform Trust Code (“NCTC”), no aspect of a Trustee’s duty to inform beneficiaries is mandatory. (*See*, N.C. Gen. Stat. § 36C-1-105). The legislative commentary to N.C. Gen. Stat. § 36C-8-813 supports the conclusion that a settlor, in this case Defendant Settlor Wilson, Jr., may override, or negate, the requirement of disclosure to the Beneficiary Plaintiffs in this matter by drafting a provision in the Trust Instrument providing that such disclosures are not required. *Id.*

14. The Defendant Settlor Wilson, Jr.[,] has done precisely this.

15. By reason of the operation of Article 2.10 of the Wilson Trust Instrument, and considered in view of N.C. Gen. Stat. § 36C-1-105, Plaintiffs are not entitled to have Defendants provide them with the information they seek in discovery or give an accounting or make reports with any Court or to the Plaintiffs/Beneficiaries.

The court then made conclusions of law including the following:

5. The Wilson Trust Instrument eliminates the requirement that Trustee Defendant Wilson, Sr., provide trust accounting information of the nature and type requested by Plaintiffs, as Article 2.10 of the Wilson Trust Instrument does not require such disclosure.

6. The Wilson Trust Instrument eliminates the requirement that Trustee Defendant Wilson, Sr., provide trust accounting information of the nature and type referenced repetitively by Plaintiffs in the Complaint.

The affidavit by John M. Martin, plaintiffs’ attorney, that the trial court references describes the necessity of discovery for developing the facts of their case:

12. Having access to the information and documents regarding the investment history of the assets comprising the Children’s Trust, currently in the exclusive possession and control of Defendants, is essential to Plaintiffs’ ability to develop the facts respecting and, in turn, their theory of the case regarding their claim for relief for breach of fiduciary duty. In turn, being in possession of information and documents responsive to and informing Plaintiffs’ breach of fiduciary duty claim will further develop their claim seeking the removal of Wilson, Sr.[,] as Trustee of the Children’s Trust. Without this discovery, Plaintiffs cannot develop the facts necessary to establish that a genuine issue of material fact exists regarding their claims for breach of fiduciary duty and seeking removal of Wilson, Sr.[,] as Trustee.

WILSON v. WILSON

[203 N.C. App. 45 (2010)]

13. As a result of the refusal of the Defendants to fully and completely answer and respond to the Plaintiffs' discovery, Plaintiffs are not in a position and are totally unable to oppose the Defendants' Motion to Dismiss, Motion for Partial Summary Judgment, and Motion for Declaratory Judgment.

In sum, then, according to the 25 August 2008 order of the trial court as well as the affidavit of the plaintiffs' own attorney, plaintiffs cannot produce evidence to support their contentions unless defendants comply with their discovery requests. Because such compliance is a duty specifically removed from defendants as trustees, then, we must agree with the trial court that there is no genuine issue of a material fact, and, as a matter of law, summary judgment should be granted to defendants.

The majority relies heavily on *Taylor v. Nationsbank Corp.*, 125 N.C. App. 515, 481 S.E.2d 358 (1997), for its conclusion that trust beneficiaries are entitled to whatever documents are necessary to enforce their rights under the trust. *Taylor* in fact concerns *only* the disclosure of the terms of a trust agreement. *Id.* at 521, 481 S.E.2d at 362. The holding of that case is stated clearly by the Court: "We hold that absent an explicit provision in the trust to the contrary, plaintiffs as trust beneficiaries are entitled to view the trust instrument from which their interest is derived." *Id.* I do not consider that this holding reverses all other aspects of the North Carolina Trust Code, particularly its clear authorization for parties to construct their own terms. See N.C. Gen. Stat. § 36C-1-105 (2009) (stating "[t]he terms of a trust prevail over any provision of this Chapter except" for a handful of exceptions).

Plaintiffs' arguments to this Court—with which the majority agrees—rely on the law regarding fiduciary obligations of a trustee, particularly that "[w]hen a fiduciary relationship exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit." *Watts v. Cumberland County Hosp. Sys.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (citation omitted), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). While this is true of a claim for breach of fiduciary duty, this does not negate the fact that such a claim in this case can only be supported by information that the trust instruments themselves state need not be produced. Thus, I believe that this Court must affirm the trial court's grant of defendants' motion for summary judgment.

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

STATE OF NORTH CAROLINA v. DWIGHT ANTHONY CLODFELTER AND
JAMES KEVIN JESSUP, DEFENDANTS

No. COA09-356

(Filed 16 March 2010)

1. Confessions and Incriminating Statements— references to defendant altered—Bruton violation—harmless error

The trial court did not err by admitting into evidence a confession made by a co-defendant where all references in the statement to the objecting defendant were altered pursuant to N.C.G.S. § 15A-927(c)(1), and even if a “*Bruton* violation” occurred, the error was harmless.

2. Criminal Law— jury instructions—referring to co-defendants as defendants—not plain error

The trial court did not commit plain error by referring to the co-defendants as “defendants” throughout the jury instructions because, given the evidence at trial, defendant cannot show that the error had a probable impact on the jury’s finding defendant guilty.

3. Homicide— first-degree murder—jury instructions— duress and second-degree murder—no error

The trial court did not err in a first-degree murder trial by not instructing the jury on the defense of duress or the lesser-included offense of second-degree murder. Defendant was found guilty of first-degree murder on the basis of premeditation and deliberation, and duress is not a defense to first-degree murder under these theories. Moreover, the State pursued only a theory of first-degree murder and defendant was not entitled to an instruction on second-degree murder merely because the jury might not have believed all of the State’s evidence.

4. Constitutional Law— ineffective assistance of counsel—no request to record opening and closing statements

Defendant’s argument that he did not receive effective assistance of counsel in a first-degree murder trial because his counsel did not request that the court reporter record counsels’ opening and closing statements was overruled. The statute does not require that opening and closing statements be recorded in a non-capital trial and defendant did not suggest how the omission prejudiced his case.

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

5. Confessions and Incriminating Statements— pre-trial motion to suppress—not properly preserved—not plain error

Defendant's argument that the trial court erred by denying his motion to suppress a written statement given to police was not properly preserved for appeal where defendant failed to object to the reading of this statement aloud during his trial testimony, or to the statement being introduced into evidence. Reviewed under a plain error standard, defendant failed to show that, had the statement not been admitted, there was a reasonable possibility of a different result.

6. Confessions and Incriminating Statements— pre-trial motion to suppress—interrogation not by agent of police

The trial court did not err by denying defendant's motion to suppress a written statement given to police because defendant's mother did not act as an agent of the police by asking her son to tell the truth about his involvement in the murder at issue.

7. Confessions and Incriminating Statements— pre-trial motion to suppress

The trial court did not err by denying defendant's motion to suppress a written statement given to police since defendant's statement was not involuntary because defendant did not request a lawyer and his offer to continue speaking with police officers the following day showed that he was willing to talk with officers.

8. Confessions and Incriminating Statements— pre-trial motion to suppress—not properly preserved—not plain error

Defendant's argument that the trial court erred by granting the State's motion for joinder and by not redacting a statement given to police by a co-defendant was overruled. Defendant failed to properly preserve for appeal the issue of the introduction into evidence of his statement. Reviewed under a plain error standard, defendant failed to show that, had the statement not been admitted, there was a reasonable possibility of a different result.

Appeal by defendants from judgment entered 15 September 2008 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 29 September 2009.

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

Mark Montgomery for defendant Clodfelter; M. Alexander Charns for defendant Jessup.

Attorney General Roy Cooper, by Assistant Attorney Generals Charles E. Reece and LaToya B. Powell, for the State.

ELMORE, Judge.

Dwight Anthony Clodfelter (defendant Clodfelter) and James Kevin Jessup (defendant Jessup) appeal from their convictions for first degree murder, robbery with a dangerous weapon, and two counts of larceny of a firearm. Both were sentenced to a term of life imprisonment without the possibility of parole.

On 27 September 2005, Kimberly Alan Tuttle was murdered in his home when three men broke into his home to steal firearms he kept there. The three men were eventually identified as defendant Clodfelter, defendant Jessup, and Marcus Bowen. Details of the incident, particularly which of the men shot the victim, were the subject of much dispute at trial. Defendants gave conflicting statements to the police investigating the incident; those statements are outlined below.

I.

Defendant Jessup's Statement

During his testimony, SBI Special Agent Scott Williams read both the *Miranda* waiver signed by defendant Jessup and defendant Jessup's signed statement to the police made immediately thereafter. That statement narrated the events of 27 September 2005 as follows¹:

That morning, a man named Marcus called defendant Jessup and said he was coming to pick him up; Marcus and defendant Clodfelter then picked Jessup up. Defendant Clodfelter gave Marcus directions to a house in Kernersville that apparently belonged to a female friend of defendant Clodfelter. On the first pass, they missed the house and had to turn around and go back, but noted two cars in the driveway; when they returned, only a truck was in the driveway. The men parked the car; defendant Jessup stayed in the car while Marcus and defendant Clodfelter went up to the house. After ringing the doorbell and getting no answer, Marcus and defendant Clodfelter went around

1. While reading the statement, Special Agent Williams substituted the phrase "one or other persons" for defendant Clodfelter's name per the trial court's earlier ruling on that point. For ease of understanding, we have reverted to defendant Clodfelter's name here.

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

the back of the house out of defendant Jessup's sight; they returned several minutes later and motioned for defendant Jessup to join them.

The men walked into the house through the door from the garage, passing a small room on the right into which defendant Clodfelter had gone. Marcus told defendant Jessup to go upstairs, which he did; not seeing anyone there, defendant Jessup returned downstairs to join the others. At that point he entered the small room to find a man lying on the floor and defendant Clodfelter "stuffing guns into his pants"; defendant Clodfelter then told defendant Jessup to "start loading all these guns up." As defendant Jessup helped Marcus transfer the guns from the gun shelf out to the car, defendant Clodfelter told him "to help him get these guns or end up like" the man on the floor. Marcus and defendant Jessup then went upstairs and took a PlayStation console, which defendant Jessup took to the car; a few minutes later Marcus and defendant Clodfelter came out of the house with a number of additional items, which they added to the trunk. As they drove back to Winston-Salem, defendant Clodfelter and Marcus began arguing about "why [defendant Clodfelter] had to shoot the man." Defendant Clodfelter told Marcus "it was done now so no more talking about this to anybody ever." Defendant Clodfelter told defendant Jessup "not to ever speak about this again or we will get you."

Defendant Clodfelter's Statement

During his testimony, SBI Special Agent Danny Mayes read both the *Miranda* waiver signed by defendant Clodfelter and defendant Clodfelter's signed statement to the police made immediately thereafter. That statement narrated the events of 27 September 2005 as follows²:

Defendant Clodfelter had planned to rob the house of a former high school classmate where he knew shotguns were kept. He suggested the plan to Marcus, who was interested; Marcus suggested including defendant Jessup, whose full name defendant Clodfelter did not know, but whom he described as "a light-skinned black male with short hair[,] . . . about 6'1" or 6'2", weighing around 200 pounds. After picking defendant Jessup up in a car, the three men drove to where defendant Clodfelter thought the house was. They pulled into the driveway and saw someone at the house, so they returned to the car and drove to a nearby street to wait.

2. While reading the statement, Special Agent Mayes substituted the phrase "one or more other persons" for defendant Jessup's name per the trial court's earlier ruling on that point. For ease of understanding, we have reverted to defendant Jessup's name here.

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

After smoking a cigarette, they got back in the car and returned to the house, where they discovered that a car that had been parked in the driveway on their first pass was now gone. Marcus pulled into the driveway and parked. Marcus and defendant Clodfelter went to the back of the house and up some stairs to a deck; the men considered breaking in that door, but then entered the house through the door in the garage. At some point in this time defendant Jessup joined them.

They discovered a man on the phone in an interior room, then explored the upper floors of the house, “trying to be quiet so the man did not know we were there.” Not seeing any guns, defendant Clodfelter began “grabbing other stuff[,]” including an Xbox; defendant Jessup took those items to the car. The men then went downstairs, at which point defendant Jessup stated, referring to the small room near the garage where they had seen a man on the phone: “This is the only room we have not been in. . . . This has got to be where the guns are.” Defendant Jessup then tried the doorknob, which was locked; he then kicked the door open and all three men entered the room. The man inside grabbed a gun from the gun safe and fired, at which point Marcus and defendant Clodfelter ran from the room; meanwhile, defendant Jessup began “tussling” with the man. Defendant Clodfelter “grabbed five or six shotguns from the safe” and took them to the car.

Defendant Clodfelter then returned to the room with the gun safe, where he found defendant Jessup and Marcus “wrestling” with the man on the floor for his gun. Defendant Clodfelter took five or six “long guns” and took them to the car, where he put them in the trunk. When he returned to the room, the three men were still wrestling on the floor; the man said that if they let him up, he would not shoot. During this time defendant Jessup was “beating [the victim] in the head with his hands.” Marcus told defendant Clodfelter, referring to the victim: “Shoot him. Either he is going to shoot me, or I’m going to shoot him.” Defendant Clodfelter took a revolver from the gun safe and shot the victim in the head from five to six feet away. Marcus and defendant Jessup had been pinning the man down until then; when defendant Clodfelter shot the victim, Marcus jumped up and asked whether any of the three of them had left fingerprints in the house. The three men took the gun used to shoot the victim and the remaining guns in the room and left the house. Marcus then drove them away.

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

II.

Defendant Jessup's ArgumentsA. *Redacted Confession without a Limiting Instruction*

[1] Defendant Jessup first argues that the trial court erred by admitting his confession without either severing the trial or giving a limiting instruction to the jury. We disagree.

On 26 August 2008, defendant Clodfelter made a motion to suppress his statement (described above). On 28 August 2008, the State made a motion for joinder of the trials of defendants Clodfelter and Jessup. Defendant Jessup filed an objection to the motion as well as a motion for severance, arguing that the State intended to introduce defendant Clodfelter's statement (described above), which would incriminate defendant Jessup. At a hearing on 8 September 2008, the trial court allowed joinder and held that defendant Clodfelter's statement could be admitted so long as it was "sanitized" with regard to any identification of defendant Jessup.

This ruling was made pursuant to N.C. Gen. Stat. § 15A-927(c)(1), which states:

When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:

- a. A joint trial at which the statement is not admitted into evidence; or
- b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
- c. A separate trial of the objecting defendant.

N.C. Gen. Stat. § 15A-927(c)(1) (2009). When none of the three solutions is properly implemented, the error is termed a "*Bruton* violation" pursuant to the Supreme Court's holding in *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968). That violation has been articulated by our state Supreme Court as follows: "in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

be deleted without prejudice either to the State or the declarant.” *State v. Fox*, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968).

At trial, Special Agent Mayes read defendant Clodfelter’s statement into the record and altered all references to defendant Jessup from his name to the phrase “one or more other persons.” Defendant Jessup argues that this alteration was not sufficient, and that thus the trial court’s admission of it was in error. He further argues that it was an error that could have been cured by either severance or limiting jury instructions, and the absence of both also constitutes error. We disagree.

This Court has specifically held that “[a] *Bruton* violation does not automatically require reversal of an otherwise valid conviction[,]” and that this Court may apply a harmless error analysis in such situations. *State v. Hayes*, 314 N.C. 460, 469-70, 334 S.E.2d 741, 747 (1985), *reversed in part on other grounds*, 323 N.C. 306, 372 S.E.2d 704 (1988). The situation in *Hayes* was quite similar to the case at hand:

In their confessions, each defendant admitted having participated in the planning of the burglary and to being present at the [victims’] home at the time of burglary. The only discrepancies among the confessions revolved around the issue of who actually assaulted the [victims]. However, it is well established that where two or more persons join together to commit a crime, each of them, if actually or constructively present, is guilty of the particular crime and any other crime committed by the other or others in furtherance of or as a natural consequence of the common purpose. The assaults on the [victims] and the subsequent death of [one victim] as a result of the beating inflicted upon him were clearly in furtherance of or a natural consequence of the burglary committed by all three defendants. The question of which of the defendants actually committed the assaults was irrelevant to the jury verdicts finding each of the defendants guilty of all of the crimes charged. The interlocking confessions combined with the fact that certain items taken from the [victims’ home] were found in the possession of some of the defendants provided overwhelming evidence of each defendant’s guilt as to each charge and any *Bruton* error which *may* have occurred was harmless beyond a reasonable doubt.

Id. at 470, 334 S.E.2d at 747 (citations omitted). Here, each defendant’s statement implicated his co-defendant; the statements agreed on

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

every key point of the crime except the specific impetus for defendant Clodfelter's shooting of the victim. As such, even assuming *arguendo* that a *Bruton* violation occurred, we cannot see that a different result would likely have been reached had it not occurred; as such, defendant Jessup is not entitled to a new trial on this basis. N.C.G.S. § 15A-1443(a) (2009); *see Hayes* at 470, 334 S.E.2d at 747. Because we find any error to be harmless, we overrule defendant Jessup's further arguments that an error occurred that needed remedying by a limiting instruction to the jury. We also note that "a trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion"; defendant Jessup has not shown that the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision[.]" and as such we also overrule this argument. *Hayes* at 471, 334 S.E.2d at 747.

[2] Finally, defendant Jessup argues that the trial court's reference to co-defendants Jessup and Clodfelter throughout the jury instructions as "defendants" lumped their guilt or innocence of the charges together impermissibly. Defendant Jessup did not object at trial, making our review of this argument pursuant to the plain error standard of review. N.C. R. App. Proc. 10(b)(4) (2008). Reversing a jury verdict based on plain error is appropriate when "it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983) (quotations and citations omitted). Again, given the evidence presented at trial, defendant Jessup cannot show that such an impact was made by the trial court's misspeaking during the instructions to the jury. As such, this argument is overruled.

B. Instructions on Duress & Second Degree Murder

[3] Next, defendant Jessup argues that the trial court erred by not instructing the jury on the defense of duress and by not submitting the lesser-included offense of second degree murder to the jury. We disagree.

At trial, defendant Jessup's attorney had the following colloquy with the court regarding an instruction on duress:

[DEFENDANT JESSUP'S ATTORNEY]: Your Honor, the only thing that comes to mind, and I do not have a specific instruction, there was testimony from Special Agent Williams regarding Mr. Jessup's statement that he was threatened by Mr. Clodfelter to

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

act, or he would end up like Mr. Tuttle. I don't know if there's an instruction regarding threat or coercion actions.

* * *

THE COURT: Um-hum. And the purpose of that would be for?

[DEFENDANT JESSUP'S ATTORNEY]: I'm just bringing it to the Court's attention. I—I haven't researched that.

THE COURT: I don't think there would be an instruction appropriate for that.

At best, these statements by defendant Jessup's attorney constitute a vague allusion to a request for a duress requirement. As such, we do not consider that a request was properly made for the instruction and thus review for plain error. N.C. R. App. Proc. 10(b)(4) (2008).

First, we note again that defendant Jessup was convicted of first degree murder; specifically, the jury returned verdicts of guilty of first degree murder on the basis of both premeditation and deliberation and under the felony murder rule. Duress is not a defense to first degree murder. *State v. Cheek*, 351 N.C. 48, 61, 520 S.E.2d 545, 553 (1999). As defendant Jessup correctly states, it *is* a defense to certain felonies, and had the jury found that defendant Jessup committed that underlying felony under duress, he could not therefore be guilty of felony murder. However, even were that the case, as defendant Jessup was *also* found guilty on the basis of premeditation and deliberation, he would still be guilty of first degree murder. As such, this argument is overruled.

As to defendant Jessup's arguments regarding inclusion of the lesser included offense of second degree murder, we note that

a trial court must submit a lesser included offense instruction if the evidence would permit a jury rationally to find defendant guilty of the lesser included offense and acquit him of the greater. However, if the State tries the case on an "all or nothing basis," seeking a conviction only on the greater offense, then the trial court needs to present an instruction on the lesser included offense only when the defendant presents evidence thereof or when the State's evidence is conflicting.

State v. Woody, 124 N.C. App. 296, 307, 477 S.E.2d 462, 467 (1996) (quotations and citations omitted). The question, then, is whether either defendant Jessup presented evidence of second degree murder

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

or the State's evidence was conflicting. As the State notes, the only evidence to which defendant Jessup points in support of this contention is the conflict between his own statement to police and his co-defendant Clodfelter's statement to the police. As our Supreme Court noted when considering the same question—submitting second degree murder where the State pursued only a theory of first degree murder—“A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it.” *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). As such, this argument is overruled.

C. Ineffective Assistance of Counsel

[4] Finally, defendant Jessup argues that he received ineffective assistance of counsel based solely on the fact that his trial counsel did not request that the court reporter record the attorneys' opening and closing statements.

The standard for determining whether a defendant received ineffective assistance of counsel is as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)) (emphasis removed).

As to the first requirement—a severe error by trial counsel—per statute, opening and closing statements need not be recorded in a noncapital trial. N.C. Gen. Stat. § 15A-1241(a)(2) (2007). This Court has repeatedly applied this statute to uphold cases in which these statements and more were omitted from the record. *See, e.g., State v. Verrier*, 173 N.C. App. 123, 129-30, 617 S.E.2d 675, 679-80 (2005) (upholding conviction where jury selection, bench conferences, and the attorneys' opening and closing arguments were not recorded, and the defendant made no motion that they be recorded); *State v. Price*, 170 N.C. App. 57, 67, 611 S.E.2d 891, 898 (2005) (upholding conviction

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

tions where jury selection, jury instructions, bench conferences, and arguments of counsel were not recorded, and the defendant was not able to show prejudice from the omission).

As to the second requirement—the showing of prejudice—defendant Jessup does not suggest how the omission of the opening and closing statements prejudiced his case, except that various errors *might* have been made therein upon which an argument *might* be made on appeal. As we stated in *State v. Thomas*,

a defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection and bench conferences where no specific allegations of error were made and no attempts were made to reconstruct the transcript. Moreover, this Court has held that a defendant cannot establish prejudice as a result of defense counsel's failure to request recordation of those items specifically exempted from the recording statute.

187 N.C. App. 140, 147, 651 S.E.2d 924, 928 (2007). As such, this argument is overruled.

Defendant Clodfelter's Arguments

A. *Motion to Suppress*

First, defendant Clodfelter argues that the trial court erred in denying his motion to suppress the above statement elicited by the police. We disagree.

In essence, defendant Clodfelter makes three separate arguments based on three sets of circumstances: first, the timing of the *Miranda* warnings given to him; second, the role of his mother, Angela Clodfelter, in obtaining the statement; and, third, his alleged requests for a lawyer and to leave the station.

1. *Timing of Miranda Warnings*

[5] As to the first, defendant Clodfelter argues that, because his written statement was made after he signed a *Miranda* waiver, but his oral statement giving the same information was made before he signed the waiver, the waiver was ineffective, and thus a new trial is necessary. We disagree.

The facts regarding the timing of events at the police station is in dispute, but generally both sides agree that the following sequence of events took place: defendant Clodfelter was interviewed by Detective Walls for some period of time; Ms. Clodfelter then joined them in the

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

interview room and encouraged defendant Clodfelter to talk to Detective Walls and Special Agent Mayes; defendant Clodfelter made incriminating statements; defendant Clodfelter then signed a *Miranda* form waiving his rights; and then defendant Clodfelter gave the formal statement above, which was written down by Special Agent Mayes.

Defendant Clodfelter argues that, because the written statement was essentially a memorialization of the oral statement he gave without having waived his rights, the written statement should not have been admitted as evidence, as it was tainted by the pre-*Miranda* statement. *See, e.g., Missouri v. Seibert*, 542 U.S. 600, 616-17, 159 L. Ed. 2d 643, 657-58 (2004) (holding that, where a second interrogation post-*Miranda* attempted to recreate a first interrogation pre-*Miranda*, statement from the latter was inadmissible). However, while defendant Clodfelter made a motion *in limine* to suppress the statement, he did not object to Special Agent Mayes reading his statement aloud during his testimony, nor to the statement being introduced into evidence. Defendant Clodfelter therefore did not properly preserve this issue for appeal, and we review the argument for plain error. *See State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000). As such, defendant Clodfelter must show “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]” N.C. Gen. Stat. § 15A-1443(a) (2009). This he cannot do. Disregarding defendant Clodfelter’s statement, at trial Marcus Bowen testified that defendant Clodfelter planned and orchestrated the robbery and shot the victim. Defendant Jessup’s statement gave the same information. Thus, defendant Clodfelter cannot show that, had the statement not been admitted, there is a reasonable possibility of a different result, and so this argument is overruled.

2. *Role of Ms. Clodfelter*

[6] Defendant Clodfelter’s second argument centers on his mother’s participation in eliciting his statement at the police station. There is some dispute as to the exact events and their timing, but according to Ms. Clodfelter’s testimony, she and defendant Clodfelter were met at on the lawn of their house by police officers, including Kernersville Police Detective Joe Walls, whom Ms. Clodfelter knew as the coach of her daughter’s soccer team. Detective Walls told Ms. Clodfelter that the reason the officers were there “ha[d] to do with Marcus Bowen.” Defendant Clodfelter then said to her “We should call a lawyer, Mom. You should call a lawyer.” After escorting Ms. Clodfelter

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

and her two younger children inside the house to use the bathroom, she and Detective Walls came back out to the lawn, where Detective Walls told “us to come to the police department and talk to him.” Ms. Clodfelter then told defendant Clodfelter “if he didn’t have anything to hide, and he hadn’t done anything wrong, then [she] felt like we should go to the police department and talk to them.” Ms. Clodfelter was allowed to drive defendant Clodfelter to the police station in her own car, escorted by the officers in their unmarked cars.

Once at the station, Detective Walls asked defendant Clodfelter to come speak with him alone, telling Ms. Clodfelter he would return to fetch her in ten minutes. Ms. Clodfelter waited for about two hours in a small room she described as a break room; a function was being held in the station for the public, so people were filtering in and out throughout that time. At one point two officers came in, one of whom, Officer Watson, Ms. Clodfelter recognized as a School Resource Officer; she mentioned to them that she was there with her son, but did not know where he was or why they had been brought in. Officer Watson was exiting the room when the other officer told her that defendant Clodfelter had been brought in on a murder investigation. Ms. Clodfelter “realized that [she] was getting ready to throw up[,]” and Officer Watson escorted her to the bathroom, where she was sick.

When she exited the bathroom, Detective Walls had returned. Ms. Clodfelter was told that defendant Clodfelter had been brought in because of “something to do with the murder in Kernersville.” Ms. Clodfelter named the victim, whose name she remembered both because murder is a rare thing in Kernersville and because, when it happened, defendant Clodfelter commented on a news story on the murder to her. At that point, Detective Walls hugged her and told her she could help defendant Clodfelter and “we need for you to talk to him for us[.]” She and Detective Walls then went into the room with defendant Clodfelter.

Ms. Clodfelter sat next to Special Agent Mayes, while Detective Walls sat next to defendant Clodfelter. Per her testimony, Ms. Clodfelter then had the following exchange with her son:

And I just said, “Okay. If you were there—I don’t know what happened, but you’ve got to tell the truth because this man is gone. He’s never coming back. His family has lost somebody. If you know who killed him, you’ve got to tell.” And he had sat there for a minute. And he started to cry, and we talked for maybe five minutes. And he busted out crying and he said, “It was me.”

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

The officers then began asking defendant Clodfelter for details on the crime; Ms. Clodfelter testified that they presented a picture to defendant Clodfelter and asked him about specific wounds on the victim's head. Defendant Clodfelter then said "that he would explain to them what happened." Defendant Clodfelter told the officers the substance of the statement described above, starting with how they planned on going to a certain house. Detective Walls offered defendant Clodfelter a break and snack; upon their return, he read defendant Clodfelter his *Miranda* rights and had defendant Clodfelter sign a waiver.

At some point, defendant Clodfelter said he would like to come back to the station and talk about it the next day. Detective Walls stated that they planned to go to the district attorney that night, and "it's only going to get worse[.]" Defendant Clodfelter then wrote out his statement by hand and signed it.

Defendant Clodfelter attempts to paint his mother in part as an inquisitorial agent of the police, who attempted to solicit a statement where they themselves could not. In support of this argument, defendant Clodfelter relies on case law holding that

unwarned statements made by defendants to private individuals *unconnected with law enforcement*, if made freely and voluntarily, are admissible at trial. However, when an accused's statements stem from custodial interrogation by one who in effect is acting as an agent of law enforcement, such statements are inadmissible unless the accused received a *Miranda* warning prior to questioning.

State v. Morrell, 108 N.C. App. 465, 470, 424 S.E.2d 147, 150-51 (1993) (citations omitted). However, the cases on which defendant Clodfelter relies for this argument involve statements made to individuals who were actual government employees: a social worker in the case of *Morrell*, *id.* at 469, 424 S.E.2d at 150, and a sanitation worker in the case of *State v. Hauser*, 115 N.C. App. 431, 436-37, 445 S.E.2d 73, 77-78 (1994). Further, in both cases, the individuals were either encouraged or actively recruited to act as agents of the police to obtain incriminating information. *Id.* Such is not the case here. Ms. Clodfelter herself testified that all the officers asked her to do, and all she in fact did do, was ask her son to tell the truth about his involvement in the crime. Such actions do not rise to the level of Ms. Clodfelter acting as an agent of the police.

STATE v. CLODFELTER

[203 N.C. App. 60 (2010)]

3. Requests for Lawyer and to Leave

[7] Finally, defendant Clodfelter argues that police ignored his repeated requests for a lawyer and to leave the police station and return the next day, making his statement to the police involuntary and thus inadmissible.

As to his requests for a lawyer, as can be seen from his mother's testimony set out above, defendant Clodfelter made those requests *to his mother*, not to any police officer. Indeed, even defendant Clodfelter himself does not argue that he made such a statement to any officer; in his arguments to this Court, he states only that it is "reasonable" to assume that the officers heard defendant Clodfelter's statement to his mother. We are unwilling to make such a factual inference.

As to his request to leave, his mother stated that the request was in fact an offer to come back the next day to continue their discussion. Per N.C. Gen. Stat. § 7B-2101(c), "If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning." N.C. Gen. Stat. § 7B-2101(c) (2009). We agree with the State that, if anything, defendant Clodfelter's offer to continue speaking with the officers the next day was an indication not that he did not wish to be questioned further, but rather that he was perfectly willing to talk with the officers. As such, we overrule this argument.

B. Joinder and Redaction of Statement

[8] Next, defendant Clodfelter argues that the trial court erred by granting the State's motion for joinder and by not redacting defendant Jessup's statement elicited by police. We disagree.

Normally, "[t]he question of whether defendants should be tried jointly or separately is within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed on appeal absent a showing that joinder has deprived a defendant of a fair trial." *State v. Evans*, 346 N.C. 221, 232, 485 S.E.2d 271, 277 (1997). However, while defendant *Jessup* made repeated objections to the introduction of defendant Clodfelter's statement as read into the record by Special Agent Mayes, defendant *Clodfelter* himself never made such an objection. As such, this error was not properly preserved regarding the introduction of the statement, and we review defendant Clodfelter's arguments on this point for plain error. N.C. R. App. Proc. 10(b)(4) (2008). Again, therefore, defendant Clodfelter must show that "there

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]” N.C. Gen. Stat. § 15A-1443(a) (2009). As noted above, even without defendant Jessup’s statement, the jury heard from Marcus Bowen that defendant Clodfelter planned and orchestrated the robbery and shot the victim. As such, we overrule this assignment of error.

III.

We hold that defendant Clodfelter received a trial free from error and that any error in defendant Jessup’s trial was not prejudicial error.

No error.

Judges WYNN and CALABRIA concur.

DAVID E. COMBS, PLAINTIFF V. CITY ELECTRIC SUPPLY COMPANY, FORMERLY D/B/A COUNTY ELECTRIC SUPPLY CO., LTD., POINTSETTIA LTD., SEBEK LTD., TIANA LTD., THOLU LTD., KIELEY LTD., KIEBER LTD., ANDREW GREEN & EXPERTA TRUSTEES JERSEY LIMITED, AND DARREN SMITH, DEFENDANTS

No. COA09-108

(Filed 16 March 2010)

1. Employer and Employee— wrongful discharge—reporting misconduct to management—evidence sufficient

The trial court erred by granting defendants’ motion for directed verdict on a claim for the wrongful discharge of an at-will employee where the claim was based upon a retaliatory termination after plaintiff reported to management that the company was withholding negative account balance statements from customers, transferring the monies to a separate account, and continuing to invoice customers in violation of N.C.G.S. § 14-100 (obtaining property by false pretenses).

2. Employer and Employee— tortious interference with contract—termination—wrongful purpose—evidence sufficient

The trial court erred by granting defendants’ motion for directed verdict on a claim for tortious interference with a contract by defendant Smith where plaintiff reported misconduct

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

within the company to Smith and was later terminated. Plaintiff forecasted more than a scintilla of evidence that he was terminated for a wrongful purpose.

3. Appeal and Error— preservation of issues—argument not raised

Plaintiff was deemed to have abandoned an argument on appeal that a corporation ratified the acts of a supervisor in a wrongful termination suit. Plaintiff did not raise the issue in his brief, cite authority, or point to evidence in the record.

4. Unfair Trade Practices— employment dispute—not an unfair or deceptive trade practice

The trial court did not err by granting defendants' motion for a directed verdict on plaintiff's claim for unfair and deceptive trade practices after an alleged retaliatory firing. The case involved a simple employment dispute and did not fall within the purview of N.C.G.S. § 75-1.1.

Appeal by plaintiff from judgment entered 20 June 2008 by Judge Franklin F. Lanier in Forsyth County Superior Court. Heard in the Court of Appeals 19 August 2009.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

James N. Jorgensen, P.A., by James N. Jorgensen, for defendant-appellees.

STEELMAN, Judge.

Viewing the evidence in the light most favorable to plaintiff, more than a "scintilla of evidence" was presented tending to show City Electric had obtained money by false pretenses from its customers. Plaintiff's claim for wrongful discharge based upon the reporting of such conduct fell within the public policy exception to the at-will employment doctrine. Plaintiff's evidence pertaining to his tortious interference with a contract claim tends to show that his employment was terminated by his supervisor based upon a wrongful purpose. The trial court improperly granted defendant's motion for directed verdict as to defendant Smith. Because plaintiff failed to make any argument on appeal as to whether sufficient evidence was presented at trial to establish that City Electric ratified Smith's alleged tortious conduct, this issue is deemed abandoned. Where there is a general

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

employee/employer relationship and no evidence of any conduct between plaintiff and City Electric, which would “affect commerce,” the Unfair and Deceptive Trade Practices Act is not applicable.

I. Factual and Procedural Background

From August 2001 until 21 July 2003, David E. Combs (plaintiff) was employed as an accounts receivable manager at City Electric Supply Company (City Electric) in Greensboro, North Carolina. Plaintiff was hired as an at-will employee. Plaintiff oversaw the company's Raleigh Division financial operations and his job duties included allocating the monies received by City Electric to its various customer accounts. Plaintiff also was responsible for preparing a monthly bank reconciliation report with his supervisor. In October 2002, plaintiff was also assigned to submit a monthly payment of North Carolina Sales Tax to the Department of Revenue.

In January 2003, plaintiff's immediate supervisor advised him not to mail month-end statements to customers who had a negative account balance¹. Plaintiff disagreed with this policy and scheduled a meeting with Darren Smith (Smith), the head supervisor of City Electric's Greensboro office, to discuss this practice. Plaintiff met with Smith on 3 February 2003 and asserted that City Electric was stealing money from its customers. After this meeting, plaintiff believed that he started to be treated differently as an employee and that Smith was “trying to get rid of [him].”

On 28 May 2003, plaintiff received a written job performance review by Smith and received an unsatisfactory rating based upon the following:

—Lack of attention to detail—allocation errors left month after month until the credit manager resolves them.

—Not able to reconcile bank reconciliation with out [sic] the Credit Manager's help. Bank Rec. has only once been reconciled in the time frame allotted. Little or no over-time has been spent to meet this deadline. (Time frame allotted is 3-4 days from receipt of Bank Statement).

1. Plaintiff testified that a negative account balance could be attained by “a payment [that] came in before the invoice has hit the system for someone's account. It could be double payments. It could be any number of things. Somebody could have returned merchandise and was due a credit on their account because the merchandise was returned.”

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

—A new rate of pay was offered for over-seeing the payroll department and no acceptance was given to the work when it was presented.

—Unallocated cash is left in large quantities at the end of every month—unallocated cash is the sole responsibility of the AR Manager.

—Incorrect cash sheets have been faxed to every Branch and Group manager, resulting in branch complaints and a general undermining of the accounts departments ability. This error has happened on more than one occasion.

—Discussing your salary with another member of staff excluding the payroll department and myself. Salary is highly confidential and should never be discussed with anybody except the payroll department or myself.

As a result of the unsatisfactory job performance rating, plaintiff's salary was reduced \$2,000.00 and he was informed that "[a] drastic improvement must be shown in executing [his] position and duties within a three-month period, or further disciplinarily [sic] action [would] be taken at that time."

On 21 July 2003, plaintiff's employment with City Electric was terminated. During plaintiff's exit interview, Smith informed plaintiff that his termination was based upon his inability to prepare a monthly bank reconciliation report in a timely manner and his failure to submit the sales tax report correctly to the Department of Revenue. On 30 May 2006, plaintiff filed a complaint against defendants alleging wrongful discharge, tortious interference with his contractual rights, and unfair and deceptive trade practices.² Plaintiff alleged that his employment was terminated in retaliation for reporting that "Defendant [was] stealing from its customers' accounts" to City Electric's management. Plaintiff prayed for actual, punitive, and treble damages. Defendants filed an answer that denied the material allegations of plaintiff's complaint and asserted thirteen separate defenses. Defendants' answer also contained a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. On 21 March 2008, defendants' moved for summary judgment. This motion was

2. Yolanda Pritchett, who was also an employee of City Electric from 26 December 2001 to 20 February 2004, was a named plaintiff in the original complaint. Pritchett alleged that she had also been discharged in retaliation for reporting illegal conduct occurring at City Electric. Pritchett voluntarily dismissed her claims against defendants with prejudice on 5 May 2008. Pritchett testified as a witness for plaintiff at trial.

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

denied, and the trial commenced on 21 April 2008. At the conclusion of plaintiff's evidence, defendants moved for a directed verdict on all of plaintiff's claims. The trial court granted this motion and entered judgment in favor of defendants. Plaintiff appeals.

II. Standard of Review

We review a trial court's order granting a motion for directed verdict *de novo*. *Howlett v. CSB, LLC*, 164 N.C. App. 715, 718, 596 S.E.2d 899, 902, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 313 (2004). A motion for directed verdict "tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff." *Manganello v. PermaStone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977) (citation omitted). "The party moving for . . . a directed verdict, bears a heavy burden under North Carolina law." *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987). A directed verdict is not properly allowed "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Manganello*, 291 N.C. at 670, 231 S.E.2d at 680 (quotation and citation omitted). We view the evidence in the light most favorable to the nonmovant, and give the nonmovant the benefit of every reasonable inference arising from the evidence. *Crist v. Crist*, 145 N.C. App. 418, 422, 550 S.E.2d 260, 264 (2001). "If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied." *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991) (citation omitted). We do not weigh the evidence or assess credibility, but take the plaintiff's evidence as true, resolving any doubt in their favor. *Jones v. Robbins*, 190 N.C. App. 405, 408, 660 S.E.2d 118, 120, *disc. review denied*, 362 N.C. 472, 666 S.E.2d 120 (2008).

III. Wrongful Discharge—Public Policy Exception

[1] In his first argument, plaintiff contends the trial court erred by granting defendants' motion for a directed verdict as to his claim for wrongful discharge. We agree.

It is undisputed that City Electric hired plaintiff as an employee-at-will. "As a general rule, an employee-at-will has no claim for relief for wrongful discharge. Either party to an employment-at-will contract can terminate the contract at will for no reason at all, or for an arbitrary or irrational reason." *Tompkins v. Allen*, 107 N.C. App. 620, 622, 421 S.E.2d 176, 178 (1992) (citations omitted), *disc. review denied*, 333 N.C. 348, 426 S.E.2d 713 (1993). However, our Supreme

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

Court created a public policy exception to this rule in *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989):

[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Id. at 175, 381 S.E.2d at 447 (quoting *Sides v. Duke University*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826 (1985)). While there is no specific list that enumerates what actions fall within this exception, “wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer’s request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy.” *Ridenhour v. IBM Corp.*, 132 N.C. App. 563, 568-69, 512 S.E.2d 774, 778 (internal citations omitted), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999). These narrow exceptions to the at-will employment doctrine “have been grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or *the enforcement of the law.*” *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 333-34, 493 S.E.2d 420, 423 (1997) (emphasis added).

Plaintiff argues that he was discharged in retaliation for reporting to its management that City Electric had engaged in illegal and fraudulent activity by “stealing from its customers’ accounts” and cited N.C. Gen. Stat. §§ 14-72 (larceny) and 14-100 (obtaining property by false pretenses) as criminal statutes that City Electric violated. We must therefore determine whether plaintiff presented a “scintilla of evidence” supporting his claim that City Electric’s conduct violated N.C. Gen. Stat. §§ 14-72 or 14-100 to surmount defendant’s motion for directed verdict as to his wrongful discharge claim under the public policy exception.

Because this Court is reviewing a ruling on a motion for a directed verdict, we view the evidence in the light most favorable to plaintiff and take all of his evidence to be true. In support of plaintiff’s claim that City Electric was violating N.C. Gen. Stat. §§ 14-72 and 14-100, he offered a compilation of various City Electric documents into the evidence as plaintiff’s exhibit 15. Plaintiff’s exhibit 15 contains 212 pages of documents. Plaintiff’s testimony largely focused upon three customer accounts from the time period of January

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

through March 2003 as evidence that City Electric was “stealing” from its customers.

The first account belonged to Entertainment and Sports Arena located in Raleigh. In a monthly statement dated 25 January 2003, it showed that Entertainment and Sports Arena had a negative account balance of \$-2,585.18 as of 15 April 2002. Since that time, Entertainment and Sports Arena was invoiced in amounts of \$94.70, \$34.78, \$385.20, and \$587.43. However, City Electric’s “Customer Profile” shows payments had been submitted for those invoices on 30 January 2003, 17 February 2003, and 20 February 2003, leaving the negative account balance undisturbed. There is an entry in the profile on 14 February 2003 labeled “DSC TKN” in the amount of \$2,585.19. Plaintiff testified that on that date, City Electric made a \$0.01 adjustment to the negative balance, and removed it from Entertainment and Sports Arena’s account. In next month’s statement, dated 25 February 2003, the \$-2,585.18 negative balance was not reflected or applied to the balance due of \$318.86.

Plaintiff also introduced into the evidence Defendants’ Responses To Plaintiff’s Second Request For Admissions. This document shows plaintiff submitted the following request to defendants: “14. Admit that City Electric Supply Co. previously known as County Electric Supply never reimbursed Entertainment Sports Arena for the amount of \$2,585.19.” Defendants responded: “Admitted that Entertainment Sports Arena never requested and City Electric Supply Company, Inc. never paid the sum of \$2,585.19 to Entertainment Sports Arena.”

The second account belonged to Turnage Corporation located in Morehead City. In the statement dated 25 January 2003, it showed that Turnage Corporation had a negative account balance of \$-1,360.45 as of 2 August 2002. Turnage Corporation was invoiced twenty-three times after 2 August; however, its customer profile shows payments were made for each invoice prior to 25 February 2003. On 14 February 2003, City Electric made a \$0.01 adjustment to the negative account balance, and removed it from Turnage Corporation’s account.

Subsequent statements on 25 February and 25 March 2003 did not show a \$-1,360.45 balance and did not apply it to the amounts due those months. Further, in response to plaintiff’s request for admissions, defendants admitted: “that Turnage Corporation never requested and City Electric Supply Company, Inc. never paid the sum of \$1,360.46 to Turnage Corporation.”

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

The third account plaintiff focused upon was Wilbur's BBQ & Restaurant, Inc. located in Goldsboro. Wilbur's 25 January statement showed it had obtained a negative account balance in the amount of \$-218.95. Plaintiff testified that he had found no statements for this customer for the month of February 2003 and City Electric's customer profile shows no invoice or payment activity from 7 January until 26 February 2003. The customer profile showed that on 14 February 2003 City Electric made an entry labeled "DSC TKN," adjusted the negative balance by \$0.01, and removed it from Wilbur's account. A subsequent statement dated 25 March 2003 did not show a balance of \$-218.95. As was the case with Entertainment and Sports Arena and Turnage Corporation, defendant admitted that "Wilbur's BBQ & Restaurant never requested and City Electric Supply Company, Inc. never paid the sum of \$218.96 to Wilbur's BBQ & Restaurant."

There are also two documents in the record, *i.e.* the cash discount allocation log and cash receipt register, that show the monies paid by each of these customers that resulted in the negative balances were transferred from the customer's account to a City Electric account referenced as a "4020 account." Defendants do not dispute that this transfer occurred. At trial and on appeal, defendants also very candidly admit that they did not send statements to customers with negative balances. Defendants argue that the complained of conduct did not constitute obtaining property by false pretenses or larceny under the General Statutes. We disagree.

The elements of the crime of obtaining property by false pretenses are: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (quotation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002); *see also* N.C. Gen. Stat. § 14-100 (2007). The false pretense need not come through spoken words, but instead may be by act or conduct. *Id.* However, "[t]here must be a causal relationship between the representation alleged to have been made and the obtaining of the money or property." *State v. Davis*, 48 N.C. App. 526, 531, 269 S.E.2d 291, 294-95 (1980).

The preceding evidence establishes that City Electric deliberately withheld these customers' negative account balance statements in January 2003. Defendant testified that he was told that the reason for

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

this practice was “that it wasn’t in the interest of the company,” and that “[e]thics doesn’t [sic] apply in our business transactions.” City Electric then sent out statements in February and March, which indicated that each one of these customers owed a balance on their account. At that time, the money previously paid that resulted in the negative balance had been transferred from their customer account into City Electric’s “4020 account,” and the negative balance was not shown on their subsequent February and March statements. As a result of this false misrepresentation, both Turnage Corporation and Wilbur’s BBQ & Restaurant paid each invoice that was submitted to them in these statements for a total of \$4,170.83 and \$358.56, respectively.

Defendants’ contention that there was never a representation that the negative account balance was not available to be applied to outstanding invoices at the customer’s request is disingenuous based upon City Electric’s active concealment of the negative balance. We hold that taken in the light most favorable to the plaintiff and taking his evidence as true, the evidence presented at trial tended to show that City Electric violated N.C. Gen. Stat. § 14-100 by purposely withholding negative balance statements, transferring these monies to a separate account, and sending out subsequent statements that did not show the negative balance, which induced the customers to pay the amounts for each of the invoices listed therein. Because plaintiff’s wrongful discharge claim is based upon being terminated in retaliation for reporting this conduct, his claim falls within the very narrow public policy exception to the at-will employment doctrine. The trial court erred by granting defendants’ motion for directed verdict as to this claim. Plaintiff’s claim for wrongful discharge is remanded to the trial court for a new trial.

IV. Tortious Interference with a Contract

[2] In his second argument, plaintiff contends that the trial court erred by granting defendants’ motion for directed verdict as to his claim of tortious interference with a contract as to defendant Smith. We agree.

To establish a claim of tortious interference with a contract, a plaintiff must show:

- (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person;
- (2) defendant knows of the contract;
- (3) the defendant intentionally induces the third person not to perform the contract;
- (4)

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Embree Construction Group v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992) (quotation omitted). This cause of action has been found to be applicable to an employment contract that was terminable at will. *See, e.g., Smith v. Ford Motor Co.*, 289 N.C. 71, 85, 221 S.E.2d 282, 291 (1976); *Childress v. Abeles*, 240 N.C. 667, 678, 84 S.E.2d 176, 184 (1964); *Lenzer v. Flaherty*, 106 N.C. App. 496, 512, 418 S.E.2d 276, 286, *disc. review, denied*, 332 N.C. 345, 421 S.E.2d 348 (1992).

The only element defendants challenged at trial and on appeal is whether Smith was justified in terminating plaintiff's employment. For claims of tortious interference with a contract, North Carolina makes a distinction between defendants who are "outsiders" and "non-outsiders" to the contract. An outsider is

one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof. Conversely, one who is a non-outsider is one who, though not a party to the terminated contract, had a legitimate business interest of his own in the subject matter.

Smith, 289 N.C. at 87, 221 S.E.2d 292. " '[N]on-outsiders' often enjoy qualified immunity from liability for inducing their corporation or other entity to breach its contract with an employee. . . . The qualified privilege of a non-outsider is lost if exercised for motives other than reasonable, good faith attempts to protect the non-outsider's interests in the contract interfered with." *Lenzer*, 106 N.C. App. at 513, 418 S.E.2d at 286 (citations omitted).

Smith, as the head supervisor of City Electric's Greensboro office, had a legitimate business interest in the subject matter of the contract and is considered a "non-outsider." *See id.* Defendants argue that plaintiff is precluded from bringing this cause of action against Smith as a matter of law based upon this qualified privilege and contend that "the evidence shows that [plaintiff] was terminated for poor performance; not because he allegedly reported 'stealing' to City Electric."

In the light most favorable to plaintiff, the evidence at trial tended to show that on 27 January 2003 plaintiff's immediate supervisor, Tom Cherchuck, told plaintiff not to send out negative account balance statements. Plaintiff stated that he knew of several accounts that had

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

a “large negative balance” and that these customers were entitled to be informed of this balance. On 3 February 2003, plaintiff met with Smith and requested that City Electric credit these customers’ accounts or refund this money. Smith responded “that it wasn’t in the interest of the company and if the customer didn’t have a good enough accounting office to catch problems, its their fault,” and that “[e]thics doesn’t [sic] apply in our business transactions.” Plaintiff then asserted that City Electric was stealing money from its customers. Smith “became short with [plaintiff] and got busy with his work . . . and ignored [plaintiff], right in the middle of [the] meeting.” Plaintiff stated that Smith did not want to discuss these matters further. Plaintiff testified that the work environment at City Electric immediately changed within days after this meeting. Someone started going through plaintiff’s desk on a routine basis. Plaintiff was informed by other employees that he was being watched by Smith and that he was on his “hit list.” Plaintiff testified that he believed Smith was “trying to get rid of [him]” in retaliation for challenging City Electric’s practice of not sending out negative account balance statements and asserting that City Electric was stealing from its customers.

Plaintiff also testified that the written job performance review “was a complete lie” and that none of the unsatisfactory points contained therein had any factual basis. Plaintiff testified that he had never received any complaints about his work performance until after the 3 February 2003 meeting with Smith.

Plaintiff’s testimony was buttressed by two witnesses: Yolanda Pritchett (Pritchett) and Joyce Robin Shown (Shown), employees of City Electric at the time plaintiff was employed. Pritchett testified that plaintiff was “a very professional employee, very timely, trustworthy, and well-liked.” Pritchett noticed that in approximately February 2003, other employees stopped inviting plaintiff to eat lunch with them and that Smith “began to watch him from down the hall.” Pritchett also testified that she had observed Smith looking through plaintiff’s desk and his paperwork. Pritchett was told by another employee that plaintiff was on the managers’ “hit list.” Shown’s testimony mirrored Pritchett’s testimony in that she stated plaintiff was professional and hard-working, and that she had also been told that plaintiff was on the managers’ “hit list.” Neither Pritchett nor Shown articulated the reason plaintiff was on this alleged “hit list.”

Plaintiff has forecasted “more than a scintilla of evidence” in support of his allegation that he was terminated for a wrongful purpose,

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

which would defeat a non-outsider's qualified privilege to interfere with his contract. *See Barker v. Kimberly-Clark Corp.*, 136 N.C. App. 455, 463, 524 S.E.2d 821, 826-27 (2000) (reversing summary judgment and holding the plaintiff's evidence was sufficient to defeat a non-outsider's qualified privilege on the basis that her managers: (1) "out of personal hostility and ill-will toward the [p]laintiff, schemed to come up with false and defamatory accusations against the [p]laintiff with the intent to bring about the termination of her employment[;]" (2) one defendant had a "hit list" with names of employees he intended to "get rid of" and the plaintiff's name was on the list; and (3) when the plaintiff confronted the defendant he admitted his desire to terminate her employment). Because the other elements of tortious interference with a contract were not challenged, we do not address them. The trial court erred by granting defendants' motion for directed verdict as to this cause of action. We reverse the trial court's order and remand for a new trial on plaintiff's tortious interference with a contract claim against Smith.

[3] Plaintiff alleged in his complaint and argued before the trial court that City Electric was liable for Smith's tortious conduct based upon the doctrine of ratification. However, plaintiff failed to raise this issue in his appellate brief, cite any authority supporting this theory, or point to any evidence in the record that would establish that City Electric had ratified Smith's conduct. Because plaintiff failed to make this argument on appeal, it is deemed abandoned. N.C.R. App. P. 28(b)(6).

V. Unfair and Deceptive Trade Practices

[4] In his third argument, plaintiff contends that the trial court erred by granting defendants' motion for directed verdict as to his claim of unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. We disagree.

In order to establish a *prima facie* claim under N.C. Gen. Stat. § 75-1.1, a plaintiff must be able to show: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citation omitted). North Carolina appellate courts have consistently held that the Unfair and Deceptive Trade Practices Act does not apply to general employer/employee relationships. *See id.* at 656, 548 S.E.2d at 710; *Schlieper v. Johnson*, 195 N.C. App. 257, 268, 672 S.E.2d 548, 555 (2009); *Kinesis Adver., Inc. v. Hill*,

COMBS v. CITY ELEC. SUPPLY CO.

[203 N.C. App. 75 (2010)]

187 N.C. App. 1, 21, 652 S.E.2d 284, 289 (2007), *disc. review denied*, 362 N.C. 177, 658 S.E.2d 485 (2008); *Buie v. Daniel International Corp.*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119-20, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982).

Plaintiff cites *Sarah Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999) and *Walker v. Sloan*, 137 N.C. App. 387, 529 S.E.2d 236 (2000) in support of the proposition that N.C. Gen. Stat. § 75-1.1 is applicable to the facts of this case. In both *Sarah Lee Corp.* and *Walker*, the Court focused upon conduct that constituted activity “affecting commerce” that occurred between the employer and employee and held that N.C. Gen. Stat. § 75-1.1 was applicable to those cases. *Sarah Lee Corp.*, 351 N.C. at 33, 519 S.E.2d at 312; *Walker*, 137 N.C. App. at 396, 529 S.E.2d at 243. In the instant case, there was no evidence presented before the trial court of any conduct that would constitute activity “affecting commerce” between plaintiff and City Electric. Plaintiff only asserts that he was fired in retaliation for “blowing the whistle” on City Electric’s practice of not sending out negative balance statements at the end of each month. Thus, the analyses and holdings in *Sarah Lee Corp.* and *Walker* are inapplicable. This case involves a simple employment dispute and does not fall within the purview of N.C. Gen. Stat. § 75-1.1. *Schlieper, supra*. This contention is without merit.

VI. Conclusion

Because plaintiff presented more than a “scintilla of evidence” that City Electric had obtained money by false pretenses from its customers, his claim for wrongful discharge based upon the reporting of this conduct fell within the public policy exception to the at-will employment doctrine. The trial court improperly granted defendants’ motion for directed verdict as to this claim. This claim is remanded for a new trial.

Because plaintiff presented sufficient evidence that his employment was terminated by Smith based upon some wrongful purpose, the trial court erred by granting defendants’ motion for directed verdict on plaintiff’s tortious interference with a contract claim as to Smith. Plaintiff failed to argue on appeal that City Electric ratified Smith’s alleged tortious conduct, and this issue is deemed abandoned. Plaintiff’s claim against Smith, individually, is remanded for a new trial.

The Unfair and Deceptive Trade Practices Act is not applicable to a simple employment dispute between an employer and employee.

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

The trial court properly granted defendants' motion for directed verdict as to plaintiff's unfair and deceptive trade practices claim.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

Judges HUNTER, Robert C. and GEER concur.

CASIMER C. MARZEC AND NYECO, INC., PLAINTIFFS v. FRANKLIN L. NYE, JR., AND
NYECO, INC., DEFENDANTS

No. COA08-1451

(Filed 16 March 2010)

1. Corporations— derivative claim—shareholder—fiduciary duty

Plaintiffs' complaint alleging breach of fiduciary duty and conversion of corporate property sufficiently alleged that plaintiff Marzec was a shareholder of Nyeeco, Inc. and, therefore, that defendant Nye, as majority shareholder, owed a fiduciary duty to plaintiff.

2. Statutes of Limitation and Repose— breach of fiduciary duty and conversion of corporate property—continuing wrong doctrine

The trial court erred in determining that plaintiffs' complaint alleging breach of fiduciary duty and conversion of corporate property established that the claims were barred by the three-year statute of limitations. Plaintiff Marzec's claims based on defendant Nye's failure to pay plaintiff's salary and to provide an accounting were timely under the continuing wrong doctrine. The complaint did not contain allegations establishing that the statute of limitations had run on plaintiff's claims based on defendant's obtaining a personal loan in the company's name, payment of the loan from corporate funds, or usurping a corporate opportunity. Plaintiff's claim based on defendant's failure to produce corporate records was time-barred.

3. Corporations— judicial dissolution

The trial court erred in not ruling on plaintiff Marzec's request for judicial dissolution of Nyeeco, Inc. pursuant to

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

N.C.G.S. § 55-14-30(2) as plaintiff's complaint alleged at least two statutory grounds for dissolution.

Appeal by plaintiffs from order entered 6 August 2008 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 7 May 2009.

Dillow, McEachern & Associates, P.A., by Mary Margaret McEachern, for plaintiffs-appellants.

Shipman & Wright, LLP, by Gary K. Shipman, William G. Wright, and Matthew W. Buckmiller, for defendants-appellees.

GEER, Judge.

Plaintiff Casimer C. Marzec, on behalf of himself and derivatively on behalf of Nyeco, Inc., appeals from the trial court's order dismissing his action against defendants Franklin L. Nye, Jr. and Nyeco, Inc. pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. We disagree with the trial court's determination that the allegations of the complaint establish that plaintiffs' claims are barred by the statute of limitations and, therefore, we reverse. Further, we hold that the trial court erred in not addressing Marzec's request for judicial dissolution of Nyeco.

Facts

The complaint filed in this action alleges the following facts. Nye incorporated Nyeco, a closely held corporation, in North Carolina on 21 February 2002. Nyeco was in the business of providing floor maintenance and cleaning services for commercial accounts and distributing certain floor-cleaning and maintenance products.

On 24 March 2002, Nye and Marzec entered into the following agreement:

I, Frank L. Nye, agree to sell 25% of ownership in NYECO [I]nc. to Casimer Marzec in exchange for \$50,000.00. I further agree to offer an option to buy additional shares in NYECO [I]nc. for a period of five years beginning at the time of this signed agreement. Future share prices will be determined when [the] option is exercised. They will be based on net revenues for the preceding 12 months. Net revenues times (3.5) shall be used to figure value of shares of NYECO [I]nc. at any future date. Total

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

additional shares available shall not exceed 20% of ownership in NYECO [I]nc.

The two men also entered into the following capital agreement:

I, Frank Nye, agree to pledge share purchase capital as follows. \$20,000 shall remain in company as a loan for on going [sic] operating needs. \$10,000 shall be placed in the bank and used as collateral for a line of credit. The remaining \$20,000 shall be used to retire debt associated with NYECO [I]nc. prior to this agreement.

On 15 May 2002, Marzec and Nye conducted an annual shareholders meeting at which they elected Nye president and treasurer and Marzec vice president and secretary. The two men agreed that each would receive \$4,000.00 a month as compensation for their roles in the company. The Nyeco business plan provided that Nye would handle sales and service calls, while Marzec would be responsible for the bookkeeping and other administrative matters.

The company's primary product, "Multi-Clean," was a new kind of floor coating that would maintain a high-gloss finish for longer periods of time than traditional floor coatings, thereby reducing the frequency of floor maintenance. In the summer of 2002, however, the Multi-Clean floor coating system was discovered to be defective, and Nyeco stopped selling the product.

According to the complaint, in September 2002, Nye unilaterally stopped making monthly payments to Marzec, although he continued to make monthly payments to himself. In March 2003, Nye obtained a personal loan in Nyeco's name and subsequently made payments on that loan using Nyeco funds. The complaint further alleges that in November 2003, Nye took a job with a competitor of Nyeco.

On 23 April 2004, Marzec sent Nye a letter requesting copies of Nyeco's corporate tax returns for fiscal years 2002 and 2003, a copy of Nyeco's corporate minute book, Marzec's share certificates, and \$60,850.00 in back salary. The letter accused Nye of shutting Marzec out of the business beginning on 1 April 2004 and requested that Nye repurchase Marzec's shares for the sum of \$47,541.00. Nye did not respond to the letter. In addition to the letter, Marzec made other unsuccessful attempts himself and through his attorney to resolve the dispute with Nye.

From 2005 through 2007, Marzec lived in Nevada. Although he received no actual income from Nyeco, Marzec was sent a Schedule

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

K-1 for the year 2006, stating that he had realized \$20,000.00 in income from Nyeco. He also received a K-1 for the year 2007 stating that he had realized \$5,000.00 in income from Nyeco for that year. As a result, Marzec had to pay \$1,500.00 in taxes on income he never received.

On 4 June 2008, after Marzec returned to live in Wilmington, North Carolina, Marzec filed a complaint on behalf of himself and a shareholder derivative action on behalf of Nyeco against Nye and Nyeco. Marzec alleged claims for (1) fraudulent misrepresentation, (2) breach of fiduciary obligations, (3) conversion of corporate property, (4) breach of contract, and (5) default on a loan. In a final claim for relief, Marzec sought a decree of judicial dissolution. On 21 July 2008, Nye filed an answer and a motion to dismiss Marzec's claims pursuant to Rule 12(b)(6) of the Rules of Civil Procedure.

Following a hearing on 5 August 2008, the trial court entered an order on 6 August 2008 stating that defendants had moved "for a dismissal pursuant to Rule 12(b)(6) on the ground that . . . the pertinent statutes of limitations on the Plaintiffs' claims had expired and that the Plaintiffs' complaint did not state a claim for a default of a loan" The court noted that plaintiffs had voluntarily dismissed the claim for default of a loan and then allowed the motion to dismiss on the remaining claims based on the statute of limitations. Marzec timely appealed to this Court.

I

Marzec's first contention on appeal is that the trial court erred in dismissing his claims for breach of fiduciary duty and conversion of corporate property.¹ When reviewing an appeal from a motion to dismiss, " [t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (quoting *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001)), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "Documents attached as exhibits to the complaint and incorporated therein by reference are properly considered when ruling on a 12(b)(6) motion." *Woolard v. Davenport*, 166 N.C. App. 129, 133-34, 601 S.E.2d 319, 322 (2004).

1. Although Marzec also asserted claims for breach of contract and fraudulent misrepresentation, he did not assign error to the trial court's dismissal of those claims, and we, therefore, do not address them on appeal.

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

[1] Nye initially argues that Marzec's claims for breach of fiduciary duty and conversion of corporate property must fail because the complaint does not sufficiently allege that Marzec was a shareholder in Nyeco. We disagree. The complaint specifically alleges that Marzec is a 25% shareholder of Nyeco. Further, it alleges that on 24 March 2002, Nye and Marzec entered into an agreement in which Nye promised to convey to Marzec a 25% stock interest in Nyeco in exchange for \$50,000.00. It also alleges that "Marzec and Nye conducted an annual shareholders' meeting wherein Nye was elected President and Treasurer, and Marzec was elected Vice President and Secretary." In addition, attached to Marzec's complaint are the minutes from the annual shareholders meeting, which stated that "[t]he company is presently owned by Mr. Franklin Nye and Mr. Casimer Marzec" and that "[t]he company stock consists of 100,000 shares of which there are 75,000 shares owned by Mr. Nye and 25,000 owned by Mr. Marzec."

Reading these allegations and the exhibits in the light most favorable to plaintiffs, *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 37, 587 S.E.2d 470, 473 (2003), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004), we hold that plaintiff sufficiently alleged that Marzec was a shareholder in Nyeco and, therefore, that Nye, as the majority shareholder, owed a fiduciary duty to Marzec. *See Farndale Co. v. Gibellini*, 176 N.C. App. 60, 67, 628 S.E.2d 15, 19 (2006) ("In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders." (quoting *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993))).

Nye counters that under *Corp. Comm'n of N.C. v. Harris*, 197 N.C. 202, 203, 148 S.E. 174, 175 (1929), in order to be a shareholder, a party must show "not only that the stock ha[s] been issued, but that it ha[s] been actually or constructively accepted by the [party]." Nye argues that the demand letter shows Marzec was not a shareholder in Nyeco because, in the letter, Marzec asked Nye to give him the certificates for his shares. Nye contends that this request indicates that Marzec had not yet accepted the stock.

In *Powell Bros. v. McMullan Lumber Co.*, 153 N.C. 52, 55, 68 S.E. 926, 927 (1910) (internal quotation marks omitted), however, our Supreme Court recognized that "certificates are not necessary to membership in a corporation," explaining that "[i]t is the act of subscribing, or the registry of the stockholder's name upon the stock book of the company, opposite the number of shares for which he has subscribed, which gives him his title thereto, and that the certificate

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

neither constitutes his title nor is necessary to it, but only a memorial of it.” See also *Meisenheimer v. Alexander*, 162 N.C. 227, 235, 78 S.E. 161, 164 (1913) (observing that stock certificate “is not the stock itself, but constitutes only *prima facie* evidence of the ownership of that number of shares”); *Weaver Power Co. v. Elk Mountain Mill Co.*, 154 N.C. 76, 78, 69 S.E. 747, 748 (1910) (“Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital.”). Although these cases are dated, this is still the law in North Carolina. Thus, the fact that the share certificates were never given to Marzec does not require a conclusion that Marzec is not a shareholder.

[2] Turning to the basis for the trial court’s order—that Marzec’s claims are barred by the statute of limitations—it is well established that “ ‘when some fact disclosed in the complaint necessarily defeats the plaintiff’s claim,’ ” then a trial court should dismiss the complaint under Rule 12(b)(6). *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (quoting *Hooper v. Liberty Mut. Ins. Co.*, 84 N.C. App. 549, 551, 353 S.E.2d 248, 250 (1987)). Consequently, “[a] motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff’s claims if the bar is disclosed in the complaint.” *Id.*

The parties agree that a three-year statute of limitations applies to both the claim for breach of fiduciary duty and the claim for conversion. See *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (“Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) (2003).”), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005); N.C. Gen. Stat. § 1-52(4) (2009) (providing three years to bring a suit “[f]or taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery”).²

Marzec alleges that Nye breached his fiduciary duty to Marzec by (1) ceasing to make monthly salary payments to Marzec and refusing to pay Marzec back pay, (2) refusing to comply with Marzec’s request

2. We note that claims for breach of fiduciary duty that rise to the level of constructive fraud are subject to a 10-year statute of limitations. See *Babb v. Graham*, 190 N.C. App. 463, 480, 660 S.E.2d 626, 637 (2008), *disc. review denied*, 363 N.C. 257, 676 S.E.2d 900 (2009). Since Marzec does not specifically argue constructive fraud, nothing in this opinion should be deemed to address whether Marzec’s complaint sufficiently alleged a claim for constructive fraud or whether that claim would be barred by the statute of limitations.

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

for an accounting, (3) refusing to produce the company's business records, (4) taking out a personal loan in the company's name and making payments on that loan with company funds, and (5) usurping a corporate opportunity. Generally, a claim for breach of fiduciary duty accrues when the right to bring the claim arises. *Babb*, 190 N.C. App. at 481, 660 S.E.2d at 637.

With respect to the allegations relating to the payment of Marzec's salary and back pay and the request for an accounting, Nye contends that any claim accrued on 23 April 2004 when Marzec sent his demand letter to Nye requesting an accounting and back pay. Under this view, the statute of limitations would have run by the time the complaint was filed on 4 June 2008. Marzec argues, however, that his claim is timely under the continuing wrong doctrine.

"Our Supreme Court has recognized the continuing wrong doctrine as an exception to the general rule that a claim accrues when the right to maintain a suit arises." *Id.* Under the continuing wrong doctrine, the statute of limitations does not start running " 'until the violative act ceases.' " *Id.* (quoting *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003)). For the continuing wrong doctrine to apply, the plaintiff must show " '[a] continuing violation' " by the defendant that " 'is occasioned by continual unlawful acts, not by continual ill effects from an original violation.' " *Id.* (quoting *Williams*, 357 N.C. at 179, 581 S.E.2d at 423). According to Marzec, Nye's refusal to pay him his salary and back pay and to provide him with an accounting amounted to a continuing violation.

In *Babb*, 190 N.C. App. at 480-81, 660 S.E.2d at 637-38, this Court applied the continuing wrong doctrine to the plaintiffs' claim for breach of fiduciary duty. The beneficiaries of a trust sued the trustee for breach of fiduciary duty, alleging that the trustee had refused to make required distributions under the trust. This Court held: "In the present case, [the beneficiaries] alleged, and [the trustee] testified, that [the trustee] continuously refused to make distributions under the trusts until he was removed as trustee on 3 June 2004. Therefore, [the trustee's] wrongful conduct, the refusal to make distributions, continued until he was removed as trustee on 3 June 2004." *Id.* at 481, 660 S.E.2d at 637. Accordingly, the Court concluded that the breach of fiduciary duty claims were not barred. *Id.*

In a case from New York, *Butler v. Gibbons*, 173 App. Div. 2d 352, 353, 569 N.Y.S.2d 722, 723 (1st Dept. 1991), the plaintiff alleged that

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

the defendant had failed to pay the plaintiff his share of the rents on property the parties jointly owned. The court held that the trial court improperly concluded that the plaintiff's claims for breach of fiduciary duty were barred by the six-year statute of limitations because "Plaintiff's allegations clearly make out a continuing wrong, *i.e.*, Gibbons' repeated and continuing failure to account and turn over proceeds earned from renting the properties" *Id.* The court reasoned that "a new cause of action accrued each time defendant collected the rents and kept them to himself. . . . Plaintiff's action was therefore timely as to any such proceeds which were retained by defendant during the six years preceding the commencement of the action." *Id.* We find *Butler* persuasive authority with respect to the salary claims in this case.

Here, as in *Babb* and *Butler*, a cause of action for breach of fiduciary duty for failure to pay Marzec's salary accrued each time Nye failed to pay Marzec his monthly salary. Marzec's claim is, therefore, timely as to the failure to pay Marzec's salary and failure to provide an accounting during the three years preceding the filing of this action. See *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 695, 483 S.E.2d 422, 429-30 (1997) (holding, under continuing wrong doctrine, that plaintiffs were "allow[ed] . . . to pursue claims for underpayments for three years before they commenced actions"); *Sadov Realty Corp. v. Shipur H'Shechuna Corp.*, 202 App. Div. 2d 178, 179, 608 N.Y.S.2d 204, 204 (1st Dept.) ("The trial court also properly held that defendant's receipt and retention of rental proceeds was a continuing wrong that made the action for an accounting timely for up to six years prior to the commencement of the action"), *appeal dismissed*, 84 N.Y.2d 923, 621 N.Y.S.2d 521, 645 N.E.2d 1221 (1994).

With respect, however, to Marzec's theory that a breach of fiduciary duty occurred based on Nye's failure to produce corporate records, Marzec has not demonstrated the existence of a continuing wrong. Marzec made one request for the records on 23 April 2004. He has not demonstrated how the ongoing failure to respond to this request constituted continual unlawful acts as opposed to continual ill effects from the original failure to produce the records. See *Williams*, 357 N.C. at 179, 581 S.E.2d at 423.

Likewise, Marzec has failed to cite any authority, and we have found none, suggesting that the continuing wrong doctrine should apply to Marzec's allegations that Nye took out a personal loan in

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

Nyeco's name and converted corporate funds to make payments on that loan and that Nye usurped a corporate opportunity by taking a job with a competitor of Nyeco in November 2003. With respect to these breach of fiduciary duty allegations, however, our refusal to apply the continuing wrong doctrine does not necessarily mean that this aspect of Marzec's breach of fiduciary duty claim is barred by the statute of limitations.

With respect to the personal loan, in *Brown v. King*, 166 N.C. App. 267, 269, 601 S.E.2d 296, 297 (2004), this Court held that a plaintiff's claim for breach of fiduciary duty based on the defendant's obtaining a loan in the plaintiff's name accrued when the plaintiff discovered what the defendant had done. In this case, the complaint alleges that Nye took out the personal loan in March 2003, but does not allege when Marzec discovered this fact. The complaint does not, therefore, contain allegations establishing that this aspect of the fiduciary duty claim is barred by the statute of limitations.

As for the conversion of corporate funds, the statute of limitations for conversion generally begins running at the time a defendant asserts dominion over the property. See *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 311, 603 S.E.2d 147, 165-66 (2004) (holding that plaintiff's claim for conversion of funds was barred by statute of limitations because "[t]he conversion occurred when Robert White exercised unlawful dominion over the funds—in other words, when Robert White withdrew the funds from the annuities without plaintiff's permission"), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). See also *First Investors Corp. v. Citizens Bank, Inc.*, 757 F. Supp. 687, 690-91 (W.D.N.C. 1991) (observing that "[t]he general rule thus appears to be that conversion actions accrue upon the conversion itself rather than upon its discovery" and concluding that "the Plaintiffs' cause of action for each alleged conversion accrued at the time of that particular conversion"), *aff'd per curiam*, 956 F.2d 263 (4th Cir. 1992). Since the complaint in this case does not allege when Nye made the payments on the loan (the act exercising dominion over the funds), we again cannot determine from the allegations of the complaint that the conversion claim is barred by the statute of limitations. See *Benson v. Barefoot*, 148 N.C. App. 394, 396, 559 S.E.2d 244, 246 (2002) (holding that as neither complaint nor answer gave date on which alleged conversions took place, judgment on pleadings was improper).

Finally, this Court held in *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 235, 330 S.E.2d 649, 651, *disc. review denied*, 314 N.C. 541,

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

335 S.E.2d 19 (1985), that the statute of limitations for a breach of fiduciary duty based on usurping a corporate opportunity does not begin to run until the plaintiff becomes aware that the defendant usurped a corporate opportunity. Thus, Marzec's claim alleging a breach of fiduciary duty through usurping a corporate opportunity started running when Marzec discovered, or should have discovered, that Nye was working for a competitor.

Nye contends this date was 23 April 2004, when Marzec sent the letter to Nye demanding an accounting, records, his share certificates, and back pay. The 23 April 2004 letter does not, however, say anything about Nye's going to work for a competitor or in any way indicate that Marzec had discovered this fact. In the absence of any allegation in the complaint as to when Marzec discovered or should have discovered that Nye was working for a competitor, there is no basis for dismissing this aspect of Marzec's breach of fiduciary duty claim. *See Benson*, 148 N.C. App. at 396-97, 559 S.E.2d at 246.

In sum, under the continuing wrong doctrine, the trial court erred in dismissing Marzec's claim for breach of fiduciary duty based on the failure to pay his salary and for an accounting for the three years preceding the filing of Marzec's complaint. Further, the complaint does not contain allegations establishing that the statute of limitations has run as to the breach of fiduciary duty claims based on Nye's obtaining a personal loan in the company's name, payment of the loan from corporate funds, and usurping a corporate opportunity. The trial court did not err, however, in concluding that the statute of limitations had run to the extent the breach of fiduciary duty claim is based on the failure to produce corporate records.

II

[3] Marzec also argues that the trial court should have ruled on his application to dissolve the corporation. Pursuant to N.C. Gen. Stat. § 55-14-30(2) (2009), a shareholder may seek to have a corporation dissolved by the superior court

if it is established that (i) the directors or those in control of the corporation are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; (ii) liquidation is reasonably necessary

MARZEC v. NYE

[203 N.C. App. 88 (2010)]

for the protection of the rights or interests of the complaining shareholder; (iii) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; (iv) the corporate assets are being misapplied or wasted; or (v) a written agreement, whether embodied in the articles of incorporation or separate therefrom, entitles the complaining shareholder to liquidation or dissolution of the corporation at will or upon the occurrence of some event which has subsequently occurred, and all present shareholders, and all subscribers and transferees of shares, either are parties to such agreement or became a shareholder, subscriber or transferee with actual notice thereof[.]

If grounds exist under N.C. Gen. Stat. § 55-14-30(2) for dissolution, “the decision to dissolve the corporation is within the trial court’s sound discretion.” *Royals v. Piedmont Elec. Repair Co.*, 137 N.C. App. 700, 704, 529 S.E.2d 515, 518, *disc. review denied*, 352 N.C. 357, 544 S.E.2d 548 (2000).

In his complaint, Marzec alleged that Nye and Marzec were “unable to agree upon the proper and reasonable management of Nyeco’s affairs” and that “[a]s a result, it [was] not reasonably practicable to carry on the business of Nyeco in conformity with its governing documents, agreements between the shareholders, and applicable law.” The complaint further alleged that “corporate assets [were] being misapplied and wasted by Nye, that Nye ha[d] through other actions and inactions breached his duties to Marzec, that Nye refuse[d] to communicate with Marzec and that judicial dissolution [was] reasonably necessary in order to protect Marzec’s rights and interests.”

These allegations are sufficient to allege the existence of at least two statutory grounds for dissolution. *See* N.C. Gen. Stat. § 55-14-30(2)(i) & (iv). Even though a decision regarding Marzec’s request for dissolution lay within the trial court’s discretion, the trial court nonetheless was required to rule one way or the other on that request for dissolution. *See Poore v. Swan Quarter Farms, Inc.*, 119 N.C. App. 546, 550-51, 459 S.E.2d 52, 54-55 (1995) (agreeing with plaintiffs that trial court erred in failing to conduct evidentiary hearing to resolve plaintiffs’ request for judicial dissolution and remanding for such a determination). The trial court, therefore, erred in granting the motion to dismiss on statute of limitations grounds without ruling on Marzec’s request for judicial dissolution.

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

Reversed and remanded.

Judges BRYANT and STEPHENS concur.

CARY CREEK LIMITED PARTNERSHIP, PLAINTIFF v. TOWN OF CARY,
NORTH CAROLINA, DEFENDANT

No. COA09-799

(Filed 16 March 2010)

**1. Declaratory Judgments— subject matter jurisdiction—
ongoing certiorari proceeding**

The superior court had subject matter jurisdiction over plaintiff's declaratory judgment claim concerning the validity of a riparian buffer ordinance and claiming inverse condemnation. The fact that plaintiff's *certiorari* proceeding was on-going did not deprive the superior court of subject matter jurisdiction.

**2. Jurisdiction— subject matter jurisdiction—controversy
not ripe—inverse condemnation**

The superior court lacked subject matter jurisdiction over plaintiff's action seeking compensation under a theory of inverse condemnation. Neither of the prerequisite events had occurred at the time plaintiff filed its claim, there had been no taking, and there was no concrete controversy ripe for adjudication.

3. Zoning— riparian buffer ordinance—inverse condemnation

The superior court did not err by granting summary judgment in favor of defendant on plaintiff's declaratory judgment claim concerning the validity of a riparian buffer ordinance and claiming inverse condemnation, and by concluding that the local laws challenged in this action were not in conflict with or preempted by general State law.

Judge JACKSON concurring in a separate opinion.

Appeal by plaintiff from orders entered 14 January 2009 and cross-appeal by defendant from order entered 14 November 2008 by Judge James C. Spencer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 18 November 2009.

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

Robertson, Medlin & Blocker, P.L.L.C., by John F. Bloss, and Smith Moore Leatherwood, L.L.P., by Marc C. Tucker, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by John C. Cooke and Michael T. Henry, for defendant-appellee.

Julia F. Youngman for Catawba Riverkeeper Foundation, Inc., Haw River Assembly, North Carolina Conservation Network, Southern Environmental Law Center and WakeUP Wake County, amici curiae.

Gregory F. Schwitzgebel, III, for North Carolina League of Municipalities and North Carolina Association of County Commissioners, amici curiae.

BRYANT, Judge.

On 29 May 2007, plaintiff Cary Creek Limited Partnership (“Cary Creek”) sought a declaratory judgment that ordinances enacted by defendant Town of Cary (“the Town”) which require preservation of riparian buffers are invalid and unenforceable or, in the alternative, that the Town must compensate Cary Creek under principles of inverse condemnation. The Town moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), which motion the trial court subsequently denied by order entered 14 November 2008. On 27 October 2008, Cary Creek moved for partial summary judgment, and on 26 November 2008, the Town moved for summary judgment as well. On 14 January 2009, following a hearing, the trial court entered orders granting summary judgment in favor of the Town and denying summary judgment to Cary Creek on both the declaratory judgment and inverse condemnation claims. Cary Creek appeals. As discussed below, we affirm in part, reverse in part, and vacate in part.

Facts

Cary Creek owns a tract of approximately 108 acres (“the site”) near the intersection of Highway 55 and Alston Avenue in the Town of Cary which it plans to develop as a mixed commercial and residential center. The site is within the Cape Fear River Basin and is traversed by both a perennial stream and two intermittent streams which flow only during wet periods.

The Town has enacted a series of ordinances known collectively as the Land Development Ordinance which includes a subchapter of stormwater management ordinances. These stormwater management

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

ordinances were designed for the “protection of riparian buffers, control of nitrogen export from development, control of peak stormwater runoff, and the use of best management practices.” Stormwater management ordinance section 7.3.2, entitled “Protecting Riparian Buffers,” required one-hundred-foot riparian buffers on either side of “[a]ll perennial and intermittent streams” indicated on USGS maps and fifty-foot buffers adjacent to other surface waters indicated by the Soil Survey of Wake or Chatham County.¹ Stormwater management ordinance section 7.3.7 permits parties to seek a variance from the riparian buffer requirement from the Cary Town Council (“the Council”). The Council denied Cary Creek’s request for such a variance on 26 April 2007.

Cary Creek raises two arguments on appeal, contending the trial court erred in granting summary judgment to the Town on Cary Creek’s (I) declaratory judgment and (II) inverse condemnation claims. The Town cross-appeals on two issues, arguing that the trial court erred in its 14 November 2008 order denying the Town’s motion to dismiss Cary Creek’s (III) declaratory judgment and (IV) inverse condemnation claims for lack of subject matter jurisdiction. Because the Town’s cross-appeal implicates the threshold issue of subject matter jurisdiction, we address those arguments first. We affirm both the trial court’s denial of the Town’s motion to dismiss and its grant of summary judgment to the Town on Cary Creek’s declaratory judgment action. We reverse the trial court’s denial of the Town’s motion to dismiss the inverse condemnation claim and vacate the grant of summary judgment to the Town on this claim.

III

[1] The Town first contends that the superior court lacked subject matter jurisdiction over Cary Creek’s declaratory judgment claim. As discussed below, we disagree.

“A suit to determine the validity of a zoning ordinance is a proper case for a declaratory judgment.” *Laurel Valley Watch, Inc. v. Mt. Enters. of Wolf Ridge, LLC*, — N.C. App. —, —, 665 S.E.2d 561, 565 (2008) (citations omitted). In a pair of unpublished opinions, we have previously approved a plaintiff challenging the validity of the Town’s riparian buffer ordinance and claiming inverse condemnation via a declaratory judgment action while also pursuing a separate cer-

1. The Town has since revised its ordinances, but the parties have stipulated that Cary Creek’s development is subject to the previous ordinance scheme as discussed herein.

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

tiorari proceeding to challenge the Town's denial of his request for a variance under the ordinance. *See ARH Int'l Co. v. Cary*, 170 N.C. App. 436, 613 S.E.2d 753 (2005) (unpublished); *Hashemi v. Town of Cary*, 173 N.C. App. 447, 618 S.E.2d 875 (2005) (unpublished). Indeed, because the standard of review and role of the superior court is different in certiorari proceedings, where it sits as an appellate court, than in declaratory judgment actions, where it sits as a trial court, such actions *must* be brought separately. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 661-62, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990). The fact that Cary Creek's certiorari proceeding is on-going does not deprive the superior court of subject matter jurisdiction in this declaratory judgment action. The Town's cross-assignment of error on this point is overruled.

IV, II

[2] The Town also argues that the superior court lacked subject matter jurisdiction over Cary Creek's action seeking compensation under a theory of inverse condemnation because the matter is unripe. We agree.

Cary Creek's inverse condemnation claim is based on the theory that *if* the riparian buffer ordinance is upheld as valid and enforceable in the instant case and *if* Cary Creek does not prevail in its certiorari proceeding, a taking will have occurred. Because neither of these prerequisite events had occurred at the time Cary Creek filed its claim, there had been no taking and there was no concrete controversy ripe for adjudication. *See Messer v. Town of Chapel Hill*, 125 N.C. App. 57, 61, 479 S.E.2d 221, 223, *vacated as moot*, 346 N.C. 259, 485 S.E.2d 269 (1997) (stating that "land-use challenges are not ripe for review until there has been a final decision about what uses of the property will be permitted"). We reverse the trial court's order denying the Town's motion to dismiss as to this claim. Further, because Cary Creek's inverse condemnation claim was not ripe and should have been dismissed, we also vacate the trial court's grant of summary judgment to the Town on this claim.

I

[3] Cary Creek argues that the Court erred in granting summary judgment to the Town on Cary Creek's declaratory judgment claim. We disagree.

In a declaratory judgment action to determine the validity of a zoning ordinance, "summary judgment is properly granted where the

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Laurel Valley Watch, Inc.*, — N.C. App. at —, 665 S.E.2d at 565 (internal quotation marks and citations omitted). “[A]n appellate court reviews the trial court’s decision *de novo*, with the evidence to be viewed in the light most favorable to the non-movant.” *Granville Farms, Inc. v. County of Granville*, 170 N.C. App. 109, 111, 612 S.E.2d 156, 158 (2005).

Cary Creek moved for partial summary judgment on its declaratory judgment claim, arguing that the State’s regulation of riparian buffers preempted any attempt by the Town to implement more stringent regulations. The trial court did not explain the basis for its grant of summary judgment as to Cary Creek’s declaratory judgment and inverse condemnation claims in the order entered 14 January 2009 titled “Summary Judgment in Favor of the Town on Counts I and II”. However, in its order granting partial summary judgment in favor of the Town in response to Cary Creek’s motion, also entered 14 January 2009, the trial court states that “the local laws challenged in this action are not in conflict with or preempted by general State law”.

In *Granville Farms, Inc.*, we also considered whether an “ordinance was preempted because it purports to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.” *Id.* That case concerned the land application of biosolids and we noted that the relevant “statute, coupled with the permit requirements set forth in the applicable regulations, are so comprehensive in scope that they were intended to comprise a ‘complete and integrated regulatory scheme’ on a statewide basis, thus leaving no room for further local regulation.” *Id.* at 116, 612 S.E.2d at 161.

In contrast, the State’s watershed management system both provides minimal protections which local governments must enforce, and explicitly permits local ordinances which are more protective than those minimal state-wide standards. North Carolina General Statute section 143-214.5, titled “Water supply watershed protection”, contains a policy statement which provides, in pertinent part:

This section provides for a *cooperative program of water supply watershed management and protection to be administered by local governments consistent with minimum statewide man-*

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

agement requirements established by the [Environmental Management] Commission. If a local government fails to adopt a water supply watershed protection program or does not adequately carry out its responsibility to enforce the minimum water supply watershed management requirements of its approved program, the Commission shall administer and enforce the minimum statewide requirements.

N.C. Gen. Stat. § 143-214.5(a) (2007) (emphasis added). This statute further specifies that local governments, such as the Town, may implement more restrictive local ordinances:

(d) **Mandatory Local Programs.**—The Department shall assist local governments to develop water supply watershed protection programs that comply with this section. Local government compliance programs shall include an implementing local ordinance and shall provide for maintenance, inspection, and enforcement procedures. As part of its assistance to local governments, the Commission shall approve and make available a model local water supply watershed management and protection ordinance. The model management and protection ordinance adopted by the Commission shall, at a minimum, include as options (i) controlling development density, (ii) providing for performance-based alternatives to development density controls that are based on sound engineering principles, and (iii) a combination of both (i) and (ii). Local governments shall administer and enforce the minimum management requirements. Every local government that has within its jurisdiction all or a portion of a water supply watershed shall submit a local water supply watershed management and protection ordinance to the Commission for approval. *Local governments may adopt such ordinances pursuant to their general police power, power to regulate the subdivision of land, zoning power, or any combination of such powers. In adopting a local ordinance that imposes water supply watershed management requirements that are more stringent than those adopted by the Commission, a county must comply with the notice provisions of G.S. 153A-343 and a municipality must comply with the notice provisions of G.S. 160A-384. This section shall not be construed to affect the validity of any local ordinance adopted for the protection of water supply watersheds prior to completion of the review of the ordinance by the Commission or prior to the assumption by the Commission of responsibility for a local water supply watershed protection*

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

program. Local governments may create or designate agencies to administer and enforce such programs. The Commission shall approve a local program only if it determines that the requirements of the program equal or exceed the minimum statewide water supply watershed management requirements adopted pursuant to this section.

N.C.G.S. § 143-214.5(d). Thus, the relevant statute specifically contemplates that local governments, such as the Town, will enact their own watershed protection ordinances and may enact more stringent provisions than the minimum requirements established by the Environmental Management Commission (“EMC”). Further, despite contentions by Cary Creek that the Town had not received approval from the EMC for its riparian buffer ordinances, N.C.G.S. § 143-214.5(d) specifies that its approval requirements “shall not be construed to affect the validity of any local ordinance adopted for the protection of water supply watersheds prior to completion of the review of the ordinance by the Commission.” *Id.*

In addition, in 2000, the Town sought an interbasin transfer certificate (“IBT”) to permit it to discharge drinking water obtained from Jordan Lake into the Neuse River Basin. The EMC issued an IBT to the Town in 2001, which required the Town to adopt ordinances creating riparian buffers “similar to or more protective than the Neuse River buffer rule.” This IBT mandate, along with the language of N.C.G.S. §§ 143-214.5 and 143-214.23(a), indicates that watershed protection is not a “field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.” *Granville Farms, Inc.*, 170 N.C. App. at 111, 612 S.E.2d at 158. Rather, the statutes anticipate that local governments will enact ordinances more restrictive than those minimal standards established by our statutes. Thus, the trial court did not err in granting summary judgment to the Town and concluding that “the local laws challenged in this action are not in conflict with or preempted by general State law.”

Cary Creek’s brief relies largely on our unpublished opinion in *Hashemi*, *supra*. However, Cary Creek fails to note that *Hashemi* was unpublished in its brief to this Court and did not serve this Court with a copy of the opinion as required. N.C.R. App. P. 30(e)(3). Where a party cites an unpublished opinion but fails to comply with the requirement that it “serve[] a copy thereof on all other parties in the case and on the court,” we may decline to consider the unpublished case. *State ex rel. Utils. Comm’n v. Town of Kill Devil Hills*, — N.C.

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

App. —, — n.1, 670 S.E.2d 341, 346 n.1 (2009) (quoting N.C.R. App. P. 30(e)(3)). Moreover, “[a]n unpublished decision of the North Carolina Court of Appeals is not controlling legal authority.” N.C.R. App. P. 30(e)(3).

In any event, Cary Creek’s reliance on *Hashemi* is misplaced. That unpublished opinion required this Court to review the trial court’s grant of a Rule 12(b)(6) motion to dismiss, a ruling based solely on the pleadings. The only issue we addressed in *Hashemi* was whether the plaintiff had stated a claim. Here, in contrast, we review a grant of summary judgment based on an extensive record, running to eight volumes, and including the EMC/IBT requirement not present in *Hashemi*. Further, in *Hashemi*, we did not consider N.C.G.S. § 143-214.5. Instead, we relied solely on N.C. Gen. Stat. § 143-214.23(a), titled “Riparian Buffer Protection Program: Delegation of riparian buffer protection requirements to local governments,” which provides, in pertinent part, that “units of local government may adopt ordinances and regulations necessary to establish and enforce the State’s riparian buffer protection requirements.” N.C.G.S. § 143-214.23(a) (2007). On the record of the present case, wherein the trial court considered extensive evidence about N.C.G.S. § 143-214.5 in connection with the requirement from the EMC that the Town adopt ordinances creating riparian buffers “similar to or more protective than the Neuse River buffer rule,” we reach a different outcome. Any discussion in *Hashemi* which may appear to hold that the Town’s riparian buffer ordinances were preempted by State law was *dictum* as that issue was not before this Court.

The concurring opinion states that “the Town’s ordinance is invalid” for failure to comply with requirements of the enabling statute, N.C. Gen. Stat. § 160A-387. While acknowledging that Cary Creek failed to make this argument at trial or on appeal, the concurrence nonetheless creates an argument not supported by the record in this case and contrary to our case law and Rules of Appellate Procedure. *See Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh’ing denied*, 359 N.C. 643, 617 S.E.2d 662 (2005) (*per curiam*); N.C.R. App. P. 10(a) (“Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule. . . .”); N.C. R. App. P. 10(c)(1) (“Each assignment of error shall so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned.”)

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

We have held that “[i]t is not the duty of this Court to supplement an appellant’s brief with legal authority or arguments not contained therein.” *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). When the appellate courts construct an appeal on behalf of an appellant, the “appellee is left without notice of the basis upon which an appellate court might rule.” *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. The concurrence is correct that the record does not contain any information about the existence of a map as part of the zoning ordinance. However, the absence of a map in the record does not support statements in the concurrence that the ordinance is invalid because it “does not include an accompanying zoning map, which is controlled and maintained by the Town itself.” Since Cary Creek never raised this issue in the trial court or on appeal, the Town had no notice that it should include such a map, if it exists, in its pleadings or in the record on appeal. Further, as noted in Footnote 1, *supra*, “[t]he Town has since revised its ordinances, but the parties have stipulated that Cary Creek’s development is subject to the previous ordinance scheme as discussed herein.” Thus, the ordinance in the form considered here no longer exists.

Affirmed in part, reversed in part and vacated in part.

Judge HUNTER, Robert C., concurs.

Judge JACKSON concurs by separate opinion.

JACKSON, Judge, concurring in a separate opinion.

I agree with the majority that we are bound to affirm the trial court’s grant of summary judgment based upon the arguments presented to us. However, I write separately to note that the Town’s ordinance is not in compliance with this Court’s precedent that clearly requires a zoning ordinance to include an independent map controlled by the municipality.

This Court previously has explained that

[a] suit to determine the validity of a zoning ordinance is a proper case for a declaratory judgment. In such an action, summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

material fact and that any party is entitled to a judgment as a matter of law.

Laurel Valley Watch, Inc., 192 N.C. App. at 396, 665 S.E.2d at 565 (citations and internal quotation marks omitted). "A municipality has no inherent power to zone its territory and possesses only such power to zone as is delegated to it by the enabling statutes." *Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjustment*, 169 N.C. App. 587, 589, 610 S.E.2d 255, 258 (2005) (quoting *Heaton v. City of Charlotte*, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971)). Accordingly, a municipality's power to zone " 'is subject to the limitations of the enabling act.' " *Id.* (quoting *Allred v. Raleigh*, 277 N.C. 530, 540, 178 S.E.2d 432, 437-38 (1971)).

Here, the "enabling act" is North Carolina General Statutes, section 160A-387, which provides, in relevant part, that in order to exercise its zoning authority, a city

shall create or designate a planning board under the provisions of this Article or of a special act of the General Assembly. The planning board shall prepare or shall review and comment upon a proposed zoning ordinance, including both the full text of such ordinance *and maps* showing proposed district boundaries.

N.C. Gen. Stat. § 160A-387 (2005) (emphasis added). This statute, therefore, requires both the written ordinance and an accompanying map:

"[A] zoning ordinance must contain a map as well as detailed textual instructions. First, the text of the ordinance describes what land uses are permitted in each district, what development standards have to be met in that district, and the like. . . . Second, a map places the land in the jurisdiction into various zoning districts. This map is an official part of the zoning ordinance."

Town of Green Level v. Alamance County, 184 N.C. App. 665, 670, 646 S.E.2d 851, 855 (2007) (quoting David W. Owens, Introduction to Zoning 23-24 (2d ed. 2001)).

In a case that addressed the parallel statute for counties, we held that "U.S.G.S. [United States Geological Survey] maps could not supply the required map" because "the U.S.G.S. maps were not part of the . . . ordinance, and in fact, were not maintained or controlled by the [municipality]." *Id.* at 672, 646 S.E.2d at 856. Additional statutes that refer to a city's zoning power acknowledge "the zoning map" as

CARY CREEK LTD. P'SHIP v. TOWN OF CARY

[203 N.C. App. 99 (2010)]

an integral piece of a zoning ordinance—a piece adopted, controlled, and amended by the city in the same manner as its other legislative enactments. *See, e.g.*, N.C. Gen. Stat. § 160A-364 (2005); N.C. Gen. Stat. § 160A-384 (2005).

Here, the Town's ordinance requires a riparian buffer for "all perennial and intermittent streams . . . as indicated on the most recent version of the 1:20,000 scale (7.5 minutes) quadrangle topographic maps prepared by the United States Geological Survey (USGS)" The record neither includes nor suggests the existence of a zoning map created by the Town as part of the challenged ordinance. Instead, the ordinance relies upon a moving target: "the most recent version" of a map prepared by an entity over which it exerts no control.

Furthermore, the ordinance's reference to a map outside its control significantly reduces the Town's responsibility to provide notice and an opportunity to be heard to those affected by its legislative decisions. Effectively, the ordinance, its requirements, and its prohibitions change any time the U.S.G.S. map changes, but the Town does not give its residents notice of such change or any opportunity to respond, because the wording of its ordinance has remained unchanged. Again, these issues were not raised on appeal, but I believe that the problems associated with an indefinite ordinance warrant attention and discussion.

Based upon the explicit holding of *Green Level* and the mandates of the North Carolina General Statutes, the Town's ordinance is invalid because it does not include an accompanying zoning map, which is controlled and maintained by the Town itself. Nonetheless, it is not the province of this Court to construct arguments for the parties. *Hyatt v. Town of Lake Lure*, 191 N.C. App. 386, 389, 663 S.E.2d 320, 322 (2008) ("It is not the role of this Court to create an avenue of appeal not properly asserted in plaintiff's brief.") (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). Accordingly, I am bound to affirm the trial court's grant of summary judgment to the Town.

STATE v. WILSON

[203 N.C. App. 110 (2010)]

STATE OF NORTH CAROLINA v. MARIO RODRIQUESO WILSON, DEFENDANT

No. COA09-438

(Filed 16 March 2010)

Constitutional Law— effective assistance of counsel—no reasonable probability of different outcome

Even assuming *arguendo* that the performance of defendant's trial counsel was deficient, defendant has not demonstrated that there was a reasonable probability that the result of the trial would have been different but for his trial counsel's actions given the overwhelming evidence supporting defendant's guilt as to the two charged offenses of attempted robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury.

Appeal by defendant from judgments entered 5 November 2008 by Judge Calvin E. Murphy in Superior Court, Mecklenburg County. Heard in the Court of Appeals 30 September 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberley A. D'Arruda, for the State.

Parish, Cooke & Condlin, by James R. Parish, for defendant-appellant.

STROUD, Judge.

Mario Rodriqueso Wilson ("defendant") was convicted of attempted robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. Defendant appeals, arguing that he did not receive effective assistance of counsel. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show that on 31 December 2006 around 8:00 or 8:30 p.m., brothers Joseph Patrick Driver ("Joseph") and James Andrew Driver ("James") drove to a check cashing place on Central Avenue in Charlotte, North Carolina to pick up \$200 wired from Western Union for their roommate Randie Greenhough. The wired money was put in Joseph's name. Joseph parked his car in a parking lot adjacent to the check cashing place and went in, while James waited in the car. As Joseph walked back to the car, defendant

STATE v. WILSON

[203 N.C. App. 110 (2010)]

confronted him with a gun, pointed it at his chest, and demanded money. Joseph reached his car and yelled for help. James got out of the car, and defendant pointed the gun back and forth between Joseph and James. Joseph grabbed defendant's arm and a struggle ensued. Joseph pushed defendant's arm up, but defendant turned his wrist and shot Joseph twice. One shot entered his chest, with the bullet lodging in his pelvis; the other bullet shattered his femur. James then joined in the struggle and defendant, Joseph, and James fell to the ground. In an attempt to disarm defendant, James bit defendant's finger. Defendant let go of the gun, and James grabbed the gun and hit defendant in the face with it. Defendant then tried to get the gun back from James but was unsuccessful and ran away. When Charlotte-Mecklenburg police officers arrived at the scene, they found a cell phone and a handgun lying on the ground in the parking lot.

As a result of his wounds, Joseph was unconscious for seven days and hospitalized for a total of thirty-two days. He had several surgeries, including chest surgery to insert lung tubes, exploratory surgery in his stomach, a tracheotomy, and surgery to repair his leg by insertion of a rod from his knee to his hip. Joseph admitted to trying marijuana, cocaine and heroin, but he was not using or looking to buy any drugs on 31 December 2006.

Thomas Ledford, a detective with Charlotte-Mecklenburg Police Department's armed robbery unit, testified that he obtained a court order to get the subscriber records of the cell phone found at the crime scene and determined that its registered owner was Calvin Robinson of Shelby, North Carolina. Calvin Robinson told Detective Ledford that his son, Orlando Robinson had the phone. Following his conversation with Calvin Robinson, Detective Ledford then obtained a photo of defendant from the Cleveland County Sheriff's Office, showed that photo of defendant to Calvin Robinson, made a photographic lineup containing defendant's picture, and showed it to James. James identified defendant as the man who shot his brother. At trial, James admitted that he had a drug addiction to heroin and that he had been using heroin the morning of 31 December 2006. Detective Ledford interviewed defendant after his arrest, and defendant never indicated that on 31 December 2006 defendant had planned to sell drugs to Joseph or that he had met Joseph at a convenience store prior to the confrontation. Instead, defendant stated that he planned to rob Joseph.

Defendant, testifying in his own defense, stated that on 31 December 2006 he rode with Steven Bess and Orlando Robinson to

STATE v. WILSON

[203 N.C. App. 110 (2010)]

Charlotte from Shelby to sell some powder cocaine to a girl that Mr. Bess knew. They were to meet her at a convenience store in Charlotte. Defendant met with the girl at the convenience store, but she refused to buy the drugs. While he was in the convenience store, defendant first saw Joseph Driver. Defendant testified that he stepped out of the store and Joseph approached defendant and asked if defendant had any drugs to sell. Defendant agreed to sell Joseph some drugs but Joseph said that he did not have any money on him and asked defendant to meet him at the check cashing place down the street so he could get some money. Mr. Bess drove to “a seafood restaurant” next to the check cashing place on Central Avenue to meet Joseph. Mr. Bess gave defendant a gun, and defendant had Mr. Robinson’s cell phone. Defendant stated he met Joseph behind the seafood restaurant by a dumpster. Defendant testified that he had the drugs in his hand and showed the drugs to Joseph, but Joseph did not appear to have any money in his hand. Defendant then stated that Joseph grabbed at the drugs and a struggle ensued. Defendant went for his gun, which was tucked into the front of his pants, and defendant and Joseph fell to the ground. Defendant stated that Joseph was on top of him and the gun fired, but defendant did not know if he or Joseph had pulled the trigger. Defendant stated that the drugs and cell phone dropped to the ground. Another male came to Joseph’s aid and was able to take the gun away from defendant and hit defendant with it. Defendant then got up and ran. Defendant went back to the convenience store and eventually found Mr. Bess and Mr. Robinson, and they returned to Shelby. Defendant stated that it was not his intention to rob Joseph but “to sell the drugs and go on about my business.”

On 13 October 2008, defendant was indicted for attempted robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was tried on these charges at the 3 November 2008 Criminal Session of Superior Court, Mecklenburg County. On 5 November 2008, the jury found defendant guilty of attempted robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. The trial court then sentenced defendant to 51 to 71 months imprisonment for the attempted robbery with a dangerous weapon and a consecutive term of 20 to 33 months for the assault with a deadly weapon inflicting serious injury. Defendant was also ordered to pay court costs, a fine of \$100 and restitution to Joseph Driver in the amount of \$750. Defendant gave oral notice of appeal at trial.

STATE v. WILSON

[203 N.C. App. 110 (2010)]

II. Ineffective Assistance of Counsel

Defendant contends that because of his trial counsel's conduct, he was denied effective assistance of counsel.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Martin, — N.C. App. —, —, 671 S.E.2d 53, 56 (2009) (quoting *State v. Blakeney*, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000) (citations omitted), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001)).

Our Supreme Court has held that, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Poindexter*, 359 N.C. 287, 291, 608 S.E.2d 761, 764 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 534, 156 L. Ed. 2d 471, 493 (2003))

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). However, ineffective assistance of counsel "claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). "Accordingly, should the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims

STATE v. WILSON

[203 N.C. App. 110 (2010)]

without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

Defendant presents three instances of conduct by his trial counsel that he argues denied him his right to effective assistance of counsel: (1) on cross-examination of Detective Angela Caroway, defendant's trial counsel brought out the fact to the jury that defendant turned himself in for unrelated robbery charges and was in custody on those charges when Detective Caroway arrived to interview defendant in Shelby when these facts could not have been brought out before the jury by the State; (2) defendant's trial counsel failed to impeach State's witness Randie Greenhough with her prior convictions of assault, disorderly conduct or attempted robbery; and (3) defendant's trial counsel was unable to introduce defense exhibit 6, which is a medical record of Joseph which noted a "polysubstance abuse history[.]" due to defense counsel's lack of preparation, consisting of not having any witness available through whom the medical record could be introduced without a stipulation by the State. As these three instances may be determined from the record alone, we will decide them on the merits. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 524.

Defendant was convicted of one count of assault with a deadly weapon inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32(b) and one count of attempted robbery with a dangerous weapon pursuant to N.C. Gen. Stat. § 14-87. "The elements of a charge under G.S. § 14-32(b) are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997) (citation and quotation marks omitted). The elements of attempted robbery with a dangerous weapon are "(1) the unlawful attempted taking of personal property from another, (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means,' and (3) danger or threat to the life of the victim." *State v. Torbit*, 77 N.C. App. 816, 817, 336 S.E.2d 122, 123 (1985) (citation omitted), *appeal dismissed and cert. denied*, 316 N.C. 201, 341 S.E.2d 573 (1986).

Even assuming *arguendo* that the performance of defendant's trial counsel was deficient for the above reasons, defendant has not demonstrated that there is a "reasonable probability" that the result of the trial would have been different but for his trial counsel's actions. *Poindexter*, 359 N.C. at 291, 608 S.E.2d at 764. There was overwhelming evidence before the jury to support defendant's guilt as

STATE v. WILSON

[203 N.C. App. 110 (2010)]

to the two charged offenses. The victim, Joseph Driver testified that he drove to the check cashing store to pick up money wired to his roommate. While returning to his car, Joseph was approached by a man who pointed a gun to his chest and demanded money. At trial, Joseph identified defendant as the man who approached him with a gun. Joseph testified that defendant “had the gun so close to me that at the time I was really fearing for my life[.]” Confirming Joseph’s testimony, James Driver testified that he heard defendant say to Joseph, “you’re gonna give me the money.” Both Joseph and James testified that: when Joseph grabbed defendant’s arm, a struggle ensued with defendant; James came to Joseph’s assistance; and during that struggle defendant turned his wrist and shot Joseph twice with the gun. The transcript of a recorded Charlotte-Mecklenburg Police Department interview with Joseph on or about 26 January 2007 also confirms that Joseph was approached by a black male with a gun in the parking lot adjacent to the check cashing place, that the man demanded money, and that Joseph was shot during that confrontation. James also identified defendant in a police photo line-up and at trial as the man who demanded money from Joseph, pointed a gun at him, and shot him.

More importantly, in defendant’s own statement to police on or about 9 April 2007, defendant said that he intended to rob Joseph Driver on 31 December 2006. Defendant’s statement to police also supports Joseph’s and James’s trial testimony regarding this confrontation: defendant approached a man going to his car in the parking lot beside the check cashing store in an attempt to rob him; defendant drew his semi-automatic handgun; another man came to the first man’s aid; a struggle ensued; defendant started shooting; one of the men got control of the gun and began hitting defendant with it; and defendant then ran away. Defendant did not tell the police that his intention was to sell drugs to Joseph or that defendant had met Joseph at a convenience store prior to their confrontation.

In addition to the evidence regarding the details of the commission of the robbery and the shooting as noted above, Joseph admitted in his testimony that he had used marijuana, cocaine, and heroin. Although a medical report mentioning Joseph’s “polysubstance abuse” could have tended to support defendant’s claim that he was trying to sell drugs to Joseph and not to rob him, Joseph did not deny that he had used illegal drugs, although he denied that he was seeking to buy drugs on 31 December 2006. It is highly unlikely that the admission of the medical report would have made any difference in

STATE OF N.C. DEP'T OF HEALTH & HUMAN SERVS. v. ARMSTRONG

[203 N.C. App. 116 (2010)]

the outcome of the case. Likewise, Randie Greenhough's testimony did not provide any additional evidence of defendant's guilt but simply corroborated Joseph and James Driver's story regarding the reason they went to the check cashing store. Defense counsel did seek to impeach Ms. Greenhough's credibility by questioning her about the prescription drugs she was taking at the time she testified, as well as on 31 December 2006, and regarding her prior cocaine use. It is doubtful that further impeachment of Ms. Greenhough regarding her prior convictions would have made any difference in the outcome of the case.

In light of all the evidence presented as to defendant's guilt, we conclude that even if defendant's arrest for unrelated charges had not been disclosed, Ms. Greenhough had been cross examined about her prior convictions, and Joseph's medical record showing "polysubstance abuse" had been introduced into evidence, it is not probable that the jury would have reached a different result as to any of defendant's charges. See *Poindexter*, 359 N.C. at 291, 608 S.E.2d at 764.

III. Conclusion

As, there is no "reasonable probability" that in the absence of defendant's trial counsel's alleged errors "the trial result would have been different[,]" *Martin*, — N.C. App. at —, 671 S.E.2d at 56, we find no prejudicial error.

NO PREJUDICIAL ERROR.

Judges GEER and ERVIN concur.

THE STATE OF NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, PLAINTIFF v. EMILY ARMSTRONG, BY AND THROUGH HER GUARDIAN AD LITEM, STEPHANIE GIBBS, SANDRA ARMSTRONG AND WILLIAM ARMSTRONG, INDIVIDUALLY, DEFENDANTS

No. COA09-639

(Filed 16 March 2010)

Abatement— prior pending action—federal lawsuit

The trial court erred by denying defendants' motion to abate this state lawsuit based upon a prior pending action in a federal lawsuit. Both lawsuits involve substantial identity as to the parties, subject matter, issues, and remedies sought.

STATE OF N.C. DEP'T OF HEALTH & HUMAN SERVS. v. ARMSTRONG

[203 N.C. App. 116 (2010)]

Appeal by defendants from order entered 20 January 2009 by Judge James W. Morgan in Superior Court, Catawba County. Heard in the Court of Appeals 29 October 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Belinda A. Smith, for plaintiff-appellee.

Kirby & Holt, L.L.P., by C. Mark Holt and William B. Bystrynski and Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Jeffrey T. Mackie, for defendant-appellants.

STROUD, Judge.

Emily, Sandra, and William Armstrong (collectively “the Armstrongs”) filed a motion to abate this lawsuit filed against them by the State of North Carolina Department of Health and Human Services, Division of Medical Assistance because of a prior pending federal court case arising out of the same subject matter. The trial court denied the Armstrongs’ motion, and they appealed. For the following reasons, we reverse.

I. Background

On or about 21 February 2003 the Armstrongs filed a complaint seeking damages for medical malpractice against James Barnes, M.D., Newton Women’s Care, P.A., Catawba Memorial Hospital, Inc., and Catawba Valley Medical Center, Inc. (collectively “2003 defendants”). The Armstrongs alleged that Emily was injured during her birth by the 2003 defendants’ negligence, causing her serious permanent injuries, including cerebral palsy and severe disabilities requiring daily skilled nursing care and several forms of therapy.

On 14 November 2006, the Armstrongs and the 2003 defendants settled the medical malpractice case. As part of the settlement order (“2006 Settlement Order”), the trial court ordered

[d]efendants James Barnes, M.D. and Newton Women’s Care, P.A., and their insurer, are authorized and directed to pay into the Catawba County Clerk of Court’s office the sum set out in the Settlement Schedule as the maximum potential amount of the Medicaid lien, as provided by N.C. Gen. Stat. § 108A-57, to be held in an interest-bearing account until such time as the actual amount of the lien owed by Emily Armstrong to the North Carolina Division of Medical Assistance is conclusively judicially determined. The funds can only be ordered to pay the lien or

STATE OF N.C. DEP'T OF HEALTH & HUMAN SERVS. v. ARMSTRONG

[203 N.C. App. 116 (2010)]

distributed to the Emily M. Armstrong Irrevocable Special Needs Trust.

A. Federal Lawsuit

On or about 22 March 2007, Emily Armstrong filed a lawsuit against Carmen Odom in her official capacity as Secretary of the North Carolina Department of Health and Human Services ("DHHS") in federal court ("federal lawsuit"). Emily Armstrong requested, *inter alia*:

1. A judgment declaring that Defendant DHHS does not have a lien on the proceeds from the minor Plaintiff's personal injury action now held in the Catawba County Clerk's office.

2. A judgment declaring that G.S. § 108A-57 and § 108A-59 are unconstitutional under the Supremacy Clause of the United States Constitution to the extent that these statutes allow Defendant DHHS to impose a lien on compensation for damages other than medical expenses in violation of 42 U.S.C. § 1396a, 42 U.S.C. § 1396k, and 42 U.S.C. § 1396p.

3. A judgment enjoining Defendant DHHS from imposing a lien on the proceeds from the minor Plaintiff's personal injury action and from enforcing G.S. § 108A-57 and § 108A-59 in a manner that violates federal law;

4. An order that the Clerk of Court of Catawba County pay the entire sum held out of the proceeds of Emily Armstrong's settlement to The Emily M. Armstrong Irrevocable Special Needs Trust.

On or about 6 July 2009, Emily's federal complaint was amended to add Sandra and William Armstrong as parties. The amended complaint also substituted Lanier Cansler for Carmen Odom, in his official capacity as Secretary of DHHS.

B. Current Pending State Lawsuit

On or about 24 September 2007, the State of North Carolina Department of Health and Human Services, Division of Medical Assistance ("DHHS") filed a complaint against James Barnes, M.D., Newton Women's Care, P.A., Catawba Memorial Hospital, Inc., Catawba Valley Medical Center, Inc., Emily, Sandra, and William Armstrong (collectively "2007 defendants") requesting that the trial court order disbursement of the funds being held by the Catawba Clerk of Court pursuant to the 2006 Settlement Order. DHHS alleged:

STATE OF N.C. DEP'T OF HEALTH & HUMAN SERVS. v. ARMSTRONG

[203 N.C. App. 116 (2010)]

1. The Honorable Thomas Kincaid sitting for the Superior Court of Catawba County approved a settlement secured on behalf of Emily Armstrong, a minor, and her parents through their lawsuit for medical malpractice and negligence; the order was entered under seal in case number 03 CVS 525. Judge Kincaid, pursuant to his authority granted the Superior Courts of North Carolina under G.S. § 1-508, placed the full amount of the Division of Medical Assistance's lien for medical payments in escrow with the Clerk of Court of Catawba County for future disbursement.

2. Under N.C.G.S. § 108A-57 . . . the State's mandated statutory recovery of medical expenses from the settlement received by Emily Armstrong and Mr. and Mrs. Armstrong is one-third the gross amount of the settlement, i.e., the full amount placed in escrow by Judge Kincaid.

3. Emily Armstrong received \$1,903,004.37 in medical payments by the State of North Carolina for medical care related to the settlement she and her parents received.

4. Under N.C.G.S. § 108A-57, the State is capped at recovering one-third the gross amount of settlement.

5. The funds held in escrow by the Clerk of Court are the last remaining funds to be disbursed from the settlement.

Eventually all of the 2007 defendants were dismissed with prejudice from DHHS's state lawsuit except for the Armstrongs. The Armstrongs filed an answer, asserting as defenses failure to state a claim pursuant to North Carolina Rule of Civil Procedure 12(b)(6) and a "prior pending action" as "Emily Armstrong . . . filed a Complaint in the United States District Court for the Western District of North Carolina, seeking a declaratory judgment that the State of North Carolina improperly and unconstitutionally attempted to impose a lien on funds[.]"

On or about 18 September 2008, DHHS filed a motion for summary judgment. On 2 January 2009, the Armstrongs filed a motion to dismiss or abate DHHS's action due to the prior pending action in federal court. The Armstrongs alleged:

1. This claim arises out of an assertion by the State of North Carolina that it has a lien for one-third of the proceeds of a tort recovery received by Emily Armstrong, a 8-year-old girl suffering from cerebral palsy who lives with her parents in Alexander County.

STATE OF N.C. DEPT OF HEALTH & HUMAN SERVS. v. ARMSTRONG

[203 N.C. App. 116 (2010)]

2. Emily Armstrong, through her guardian ad litem, filed an underlying tort complaint in state court, stating that she suffered cerebral palsy as a result of injuries she suffered at her birth caused by the negligence of the doctor who delivered her and the hospital personnel. As a result of those injuries, Emily cannot sit, crawl, walk or talk. Emily receives skilled nursing care that is paid for by the Medicaid program.

3. As part of Emily's settlement of the tort claim, Defendant DHHS was notified of the hearing for approval of the minor's settlement. On November 13, 2006, a hearing was held and the settlement was approved. The DHHS attorneys did not attend the hearing.

4. At that hearing, Judge Timothy S. Kincaid determined the maximum amount that DHHS could seek to recover as its lien and ordered that amount paid into the Catawba County Clerk of Court's office.

5. Judge Kincaid further ordered the dismissal of the underlying tort claim, once the defendants in that claim had fulfilled their obligations, and that underlying claim was dismissed with prejudice December 12, 2006.

5. (sic) On March 22, 2007, Emily Armstrong filed a claim in U.S. District Court, Western District of North Carolina, under 42 U.S.C. § 1983, seeking declaratory and injunctive relief and claiming that the State of North Carolina is violating 42 U.S.C. § 1396p, the federal Medicaid anti-lien statute, and is in violation of the Supremacy Clause and the Equal Protection Clause of the Constitution of the United States by insisting it is entitled to one-third of Emily Armstrong's settlement. In their lawsuit, plaintiffs sought to have the federal court determine the proper amount of the funds held in the Catawba County Clerk of Court's office that should be allocated to Medicaid's lien.

6. On September 24, 2007, more than six months after Emily Armstrong filed suit in U.S. District Court, the State of North Carolina filed the instant suit against Emily Armstrong, asking this court to award it all of the money held in the Catawba County Clerk's office.

7. The case filed in March, 2007, in the U.S. District Court in the Western District of North Carolina involves a substan-

STATE OF N.C. DEP'T OF HEALTH & HUMAN SERVS. v. ARMSTRONG

[203 N.C. App. 116 (2010)]

tial identity of parties, interests, and relief demanded with the instant case.

On 28 January 2008, the trial court denied the Armstrongs' motion to dismiss or abate and scheduled a hearing for DHHS's motion for summary judgment. The Armstrongs appealed.

II. Abatement

Our courts have previously determined that an order denying a motion for abatement due to a prior pending action is immediately appealable. *See Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983). The Armstrongs argue that the trial court erred in denying their motion to abate this state lawsuit based upon a prior pending action, the federal lawsuit. "When a prior action is pending between the same parties, affecting the same subject matter in a court within the state or the federal court having like jurisdiction, the subsequent action is wholly unnecessary and therefore, in the interest of judicial economy, should be subject to a plea in abatement." *State ex rel. Onslow County v. Mercer*, 128 N.C. App. 371, 375, 496 S.E.2d 585, 587 (1998) (citations omitted). "Under North Carolina law, to prevail in a plea in abatement, a defendant must show that the parties, subject matter, issues and relief sought are the same in both the present and prior actions." *Mercer* at 372, 496 S.E.2d at 586 (citation omitted). "In determining whether the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior actions, the ordinary test is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved and relief demanded." *Mercer* at 375, 496 S.E.2d at 588 (citations and quotation marks omitted). We will therefore address each of these factors.

The parties to the federal lawsuit are the Armstrongs and Lanier Cansler in his official capacity as secretary of DHHS. In this state lawsuit, after the other defendants who no longer have any interest in the case were dismissed, the parties are now the Armstrongs and DHHS. Thus, the parties in both the federal lawsuit and this action are the same.

The Armstrongs argue as to the subject matter of the two actions that "[t]he federal court claim seeks money [in the Catawba County Clerk's office] on behalf of Emily Armstrong, and the state court claim seeks that money on behalf of DHHS." We agree with the Armstrongs' argument that the subject matter of both lawsuits is the funds held by the Catawba County Clerk's office based upon the 2006

STATE OF N.C. DEP'T OF HEALTH & HUMAN SERVS. v. ARMSTRONG

[203 N.C. App. 116 (2010)]

Settlement Order and DHHS's lien asserted pursuant to N.C. Gen. Stat. § 108A-57.

The issues which must be determined in the federal lawsuit and in this state action are also substantially the same. The Armstrongs' federal lawsuit challenges the validity of the lien, while DHHS's state lawsuit seeks to recover the funds it alleges are subject to the lien. In each case, the trial court must ultimately determine the issues raised by the Armstrongs challenged to DHHS's lien pursuant to N.C. Gen. Stat. § 108A-57. Depending upon the resolution of those issues, the trial court will order that the funds being held by the Clerk of Court of Catawba County be distributed either to the Emily M. Armstrong Irrevocable Special Needs Trust or to DHHS. Therefore, the issues are also substantially similar.

Finally, all parties are seeking essentially the same remedy, as both DHHS and the Armstrongs seek to have the lien funds released. DHHS's brief points out numerous "differences" between the federal lawsuit and the state lawsuit. We are unpersuaded. In *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 387 S.E.2d 168 (1990), the parties, subject matter, issues, and remedies requested were not identical. The main legal contentions, however, were the same, and the North Carolina Supreme Court therefore ultimately determined that

while these remedies are procedurally distinct, as applied in these cases the intended result would be the same. In both cases, plaintiffs have sought an equitable remedy which would have the effect of compelling defendant to obtain a building permit and pay fees to plaintiff City of New Bern rather than to the County of Craven. Under these circumstances, we find that the remedies requested by plaintiffs, while technically distinct from one another, are substantially similar in the result sought. Furthermore, we note that where an action is pending between the parties, a plaintiff cannot bring another action involving the same subject matter and the same defendant even where the first suit demanded remedies clearly distinct from the second. In examining this question as long ago as 1936 in a case where the plaintiff sought damages in the first suit and injunctive relief in a second suit against the same defendant on the same grounds, this Court concluded this is not only taking two bites at the cherry, but biting in two places at the same time. In summary, we find the parties, subject matter, issues involved and relief requested are sufficiently similar to warrant issuance of the order of abatement in this case.

STATE v. GRAVES

[203 N.C. App. 123 (2010)]

Clark at 22-23, 387 S.E.2d at 172-73 (citation and quotation marks omitted). “In summary, we [too] find the parties, subject matter, issues involved and relief requested are sufficiently similar to warrant issuance of the order of abatement in this case.” *Id.* at 23, 387 S.E.2d at 173.

III. Conclusion

As the federal lawsuit and this state lawsuit involve substantial identity as to the parties, subject matter, issues, and remedies sought, the trial court erred in denying the Armstrong’s motion to abate and for this reason we reverse.

REVERSED.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. SANDY DELANDORE GRAVES

No. COA09-595

(Filed 16 March 2010)

1. Motor Vehicles— felony speeding to elude arrest—driving while license revoked—motion to dismiss—sufficiency of evidence

Although the trial court did not err by denying defendant’s motion to dismiss the charge of felony speeding to elude arrest, it erred by denying his motion to dismiss the crime of driving while license revoked based on insufficient evidence as conceded by the State in its brief.

2. Criminal Law— deviation from pattern jury instruction—reasonable doubt

The trial court did not err or commit plain error by deviating from the pattern jury instructions’ definition of reasonable doubt. The trial court’s instruction was substantially correct and omission of the word “fully” did not constitute plain error.

3. Motor Vehicles— felony speeding to elude arrest—pattern jury instruction

The trial court did not err or commit plain error by using the pattern jury instruction for felony speeding to elude arrest even

STATE v. GRAVES

[203 N.C. App. 123 (2010)]

though defendant contended it contained a lower standard of knowledge than that required by the statute. The instruction merely allowed the jury to find either actual knowledge or implied knowledge that the officer in question was a law enforcement officer.

Appeal by defendant from judgments entered 7 January 2009 by Judge James W. Webb in Rockingham County Superior Court. Heard in the Court of Appeals 30 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant.

ELMORE, Judge.

A jury found Sandy Delandore Graves (defendant) guilty of the following crimes: felony speeding to elude arrest, driving while license revoked, reckless driving to endanger, and level two driving while impaired. Following these convictions, defendant pled guilty to being a habitual felon. The trial court sentenced defendant to 133 to 145 months' imprisonment for felony speeding to elude arrest, 120 days' imprisonment for driving while license revoked and reckless driving to endanger, and twelve months' imprisonment for driving while impaired. Defendant now appeals. After careful consideration, we vacate defendant's conviction for driving while license revoked. As to his other convictions, we find no error.

Around midnight on the evening of 24 July 2007, Detective David Lamberth of the Eden Police Department responded to a radio communications call for "a domestic in process in or around a dark blue vehicle at the Patrick Street/Washington Street area of Eden." When Detective Lamberth arrived, he saw a dark blue car on Washington Street. Detective Lamberth turned around to pursue the car, but defendant, who was driving it, also turned around and drove in the opposite direction down Washington Street. As Detective Lamberth followed the blue car, he observed it speed up and ultimately achieve a speed of sixty-five to seventy miles per hour. He saw the blue car run three stop signs. Detective Lamberth activated his lights and sirens after seeing defendant run the first of those stop signs. The blue car eventually crossed over a yard, spun out, and hit a fire hydrant and Detective Lamberth's cruiser. Defendant then continued

STATE v. GRAVES

[203 N.C. App. 123 (2010)]

driving at approximately fifty-five miles per hour in a twenty-five mile per hour zone, ran through a fourth stop sign, and veered across the road into a residential yard. Defendant then stepped out of the car, and Detective Lamberth restrained him.

The State indicted defendant for felony speeding to elude arrest, driving while license revoked, reckless driving to endanger, driving while impaired, and being a habitual felon. A jury convicted defendant of the first four charges, and defendant pled guilty to being a habitual felon. He now appeals.

[1] Defendant first argues that the trial court erred by denying his motions to dismiss the charges of felony speeding to elude arrest, driving while license revoked, and being a habitual felon.

Our review of the trial court's denial of a motion to dismiss is well understood. [W]here the sufficiency of the evidence . . . is challenged, we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clarifies the State's case. When a defendant moves for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion.

State v. Hinkle, 189 N.C. App. 762, 766, 659 S.E.2d 34, 36-37 (2008) (quotations and citation omitted; alteration in original).

Accordingly, we begin with the elements of felony speeding to elude arrest, set out in N.C. Gen. Stat. § 20-141.5, which provides, in relevant part:

- (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
- (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

STATE v. GRAVES

[203 N.C. App. 123 (2010)]

(1) Speeding in excess of 15 miles per hour over the legal speed limit.

* * *

(3) Reckless driving as proscribed by G.S. 20-140.

(4) Negligent driving leading to an accident causing . . . [p]roperty damage in excess of one thousand dollars (\$ 1,000)[.]

(5) Driving when the person's drivers license is revoked.

N.C. Gen. Stat. § 20-141.5(a)-(b) (2009). Although there are eight aggravating factors that elevate speeding to elude arrest from a misdemeanor to a felony, the State only argued the four factors listed above. The jury had only to find that two of those four factors were present in order to convict defendant of the crime. Defendant does not challenge the sufficiency of the State's evidence as to factors (1), (3), and (4); it challenges only the sufficiency of factor (5). The State concedes that it did not present sufficient evidence to either show that defendant was driving with a revoked license for purposes of satisfying the speeding to elude arrest statute *or* to maintain a conviction for driving with license revoked.

The issue before us, then, is whether the State's failure to present sufficient evidence in support of one of four alleged aggravating factors requires us to vacate the conviction, even though the State presented sufficient evidence in support of the other three aggravating factors. In 2006, we answered this very question in the negative, albeit in an unpublished case. *State v. Owens*, 178 N.C. App. 742, 632 S.E.2d 600, 2006 N.C. App. Lexis 1648 at *6 (2006). In *Owens*, the defendant argued that the State did not present sufficient evidence of reckless driving, and, thus, the court should have dismissed the felony speeding to elude charge. *Id.* at *5. However, the defendant did not challenge the sufficiency of the State's evidence with respect to speeding or reckless driving. *Id.* We explained:

Since defendant, in this case, has made no argument indicating that the State did not prove factors (1) and (3), and since the State was required to prove only two factors, we hold that the trial court did not err in denying his motion to dismiss for insufficiency of the evidence.

Id. at *6 (citation omitted). "Although many of the enumerated aggravating factors are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses . . . , but are

STATE v. GRAVES

[203 N.C. App. 123 (2010)]

merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.” *State v. Funchess*, 141 N.C. App. 302, 309, 540 S.E.2d 435, 439 (2000); *see also State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) (“Although the indictment may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping.”) (citations omitted). Accordingly, the State need not present sufficient evidence to support every alternative way of enhancing the punishment in order to survive a motion to dismiss for insufficiency of the evidence; it need only present sufficient evidence of at least two alternatives.¹

Because the State did not present sufficient evidence that defendant committed the crime of driving with license revoked, as conceded by the State in its brief, we vacate that conviction. However, we hold that the trial court did not err by denying defendant’s motion to dismiss the charge of felony speeding to elude.

Defendant next makes two plain error arguments regarding jury instructions. As to both arguments, we find no error, plain or otherwise. “In criminal cases, a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(c)(4) (2008). “Plain error is error ‘so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.’” *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (2007) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)).

[2] Defendant argues that it was plain error for the trial court to deviate from the pattern jury instructions’ definition of “reasonable

1. Defendant also argues that the trial court erred by submitting the driving while license revoked aggravating factor to the jury because “it is impossible to tell which two of the four alleged aggravating factors the jury found.” Here, defendant makes a good point. *See State v. Moore*, 315 N.C. 738, 749, 340 S.E.2d 401, 408 (1986) (“It is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence. The jury did not indicate which of the three purposes that it was allowed to consider formed the basis for its verdict. Although two of the purposes which the jury was allowed to consider were supported by the evidence, we cannot say that the verdict was not based upon the purpose erroneously submitted.”) (citation omitted). However, defendant submits this argument as a rationale for holding that the trial court erred by denying his *motion to dismiss*. Defendant did not object to the jury instructions and did not assign error to them. Improper jury instructions are simply not part of this Court’s criteria for reviewing a motion to dismiss and must therefore have been separately preserved and argued.

STATE v. GRAVES

[203 N.C. App. 123 (2010)]

doubt,” which states, “Proof beyond a reasonable doubt is proof that *fully* satisfies or entirely convinces you of the defendant’s guilt.” (Emphasis added.) Here, while instructing the jury, the trial court omitted the word “fully” from its definition of reasonable doubt.

Absent a specific request, the trial court is not required to define reasonable doubt, but if the trial court undertakes to do so, the definition must be substantially correct. Where there is a specific request for a reasonable doubt instruction, the law does not require the trial court to use the exact language of the requested instruction. However, if the request is a correct statement of the law and is supported by the evidence, the trial court must give the instruction in substance.

State v. Miller, 344 N.C. 658, 671, 477 S.E.2d 915, 923 (1996) (citations omitted). Here, the trial court’s instruction was substantially correct. The trial court’s omission of the word “fully” did not constitute plain error.

[3] Defendant argues that it was plain error for the trial court to use the pattern jury instructions for felony speeding to elude because they contain a lower standard of knowledge than that required by the statute. The relevant portion of the trial court’s instruction follows:

For you to find the Defendant guilty of this offense the State must prove four things beyond a reasonable doubt. . . . Third, that the Defendant was fleeing a law enforcement officer who was in the lawful performance of his duties. An Eden, North Carolina police officer is a law enforcement officer with authority to enforce the motor vehicle laws. A person flees arrest or apprehension by a law enforcement officer *when he knows or has reasonable grounds to know* that an officer is a law enforcement officer, is aware that the officer is attempting to arrest or apprehend him and acts with the purpose of getting away in order to avoid arrest or apprehension by the officer.

(Emphasis added.) Defendant argues that it is improper to allow a jury to find knowledge based upon a defendant having “reasonable grounds to know” that an officer is a police officer. “[W]e agree that a defendant accused of violating N.C. Gen. Stat. § 20-141.5 must actually intend to operate a motor vehicle in order to elude law enforcement officers[.]” *State v. Woodard*, 146 N.C. App. 75, 80, 552 S.E.2d 650, 654 (2001). However, “a defendant’s ‘guilty knowledge’ [can] be either actual or implied from circumstances[.]” *State v. Parker*, 316

MUTER v. MUTER

[203 N.C. App. 129 (2010)]

N.C. 295, 303, 341 S.E.2d 555, 560 (1986) (citations omitted). Our Supreme Court has held that a defendant's reasonable belief of something equates to his implied guilty knowledge of that thing. *Id.* at 304, 341 S.E.2d at 560. Thus, the instruction in question merely allows a jury to find either actual knowledge or implied knowledge that the officer in question is a law enforcement officer and was not error.

For the foregoing reasons, we vacate defendant's conviction for driving while license revoked. However, we find that defendant otherwise received a trial free from error. Because defendant's convictions for driving while license revoked and reckless driving to endanger were consolidated for sentencing, we remand to the trial court for resentencing consistent with this opinion.

Vacated in part; no error in part.

Chief Judge MARTIN and Judge GEER concur.

JOHN D. MUTER, PLAINTIFF v. LYNN M. MUTER, DEFENDANT

No. COA09-974

(Filed 16 March 2010)

Civil Procedure— stay of proceedings—denial not an abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion to stay domestic proceedings in North Carolina pending the resolution of an Ohio action because the trial court considered the factors enumerated in *Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353. Defendant's argument that various findings and conclusions in the trial court's order were not supported was not a proper issue for consideration on appeal and defendant made no argument that the trial court acted in a patently arbitrary manner.

Appeal by defendant from order entered 16 February 2009 by Judge Albert A. Corbett, Jr., in Johnston County District Court. Heard in the Court of Appeals 27 January 2010.

MUTER v. MUTER

[203 N.C. App. 129 (2010)]

Poyner Spruill L.L.P., by George K. Freeman, Jr., and Andrew H. Erteschik, for plaintiff-appellee.

Armstrong & Armstrong, P.A., by Marcia H. Armstrong and L. Lamar Armstrong, Jr., and Ledolaw, by Michele A. Ledo, for defendant-appellant.

BRYANT, Judge.

In October 2007, defendant Lynn M. Muter filed a complaint seeking divorce and a determination of spousal support, property distribution, child custody and child support in the State of Ohio. After the Ohio court entered a temporary order on spousal support, child custody and child support, plaintiff John D. Muter moved to stay and set aside the support order. Before the Ohio court decided these motions, plaintiff filed a complaint for divorce and a determination of spousal support and property distribution in Johnston County, North Carolina, on 11 February 2008. On 17 March 2008, plaintiff moved to sever in order to have the absolute divorce claim heard immediately and moved for summary judgment on the absolute divorce claim on the basis of defendant's failure to timely file a responsive pleading. On 24 March 2008, defendant moved to dismiss for lack of personal and subject matter jurisdiction and moved to continue any determination of plaintiff's motions. On 4 April 2008, defendant moved to stay the Johnston County action pending resolution of the action pending in Ohio. On 7 April 2008, the trial court granted plaintiff's motion to sever and on 19 May 2008, granted plaintiff an absolute divorce. On 16 February 2009, the trial court denied defendant's motion to stay. From this order, defendant appeals. On 16 March 2009, defendant filed petitions for writs of supersedeas and certiorari. This court allowed the petitions 8 April 2009. As discussed below, we affirm.

Facts

The parties married in the State of Ohio in 1983 and had two children. In May or June 1998, the parties and their children moved to North Carolina, but defendant and the children returned to Ohio in November of that year. After defendant filed for divorce in Ohio in October 2007, plaintiff did not object to that state's jurisdiction and engaged in the litigation, including seeking a vocational assessment for defendant. On 26 December 2007, the Ohio court entered an order that plaintiff pay defendant more than \$16,000 per month in spousal and child support. On 3 January 2008, plaintiff moved to set aside the order and to stay its implementation. On 11 February 2008, plaintiff filed the instant action in the Johnston County District Court. On 27

MUTER v. MUTER

[203 N.C. App. 129 (2010)]

February 2008, the Ohio court denied plaintiff's motion to stay. Following the proceedings described *supra*, including the grant of an absolute divorce by the Johnston County District Court on 19 May 2008, plaintiff moved for dismissal of the entire Ohio action on the basis of the absolute divorce granted in this State. The Ohio court dismissed the entire action, but the Ohio Court of Appeals reversed on 23 December 2008, on grounds that the North Carolina divorce decree did not address the remaining claims between the parties.

Defendant made five assignments of error which she brings forward in five overlapping and contingent arguments in her brief to this Court: denominated findings of fact 31-34 and 39-40 are actually conclusions of law and are not supported by findings of fact; conclusions of law 6-12 are not supported by the findings; the relief granted is unsupported by facts and conclusions; and the trial court abused its discretion by abandoning consideration of the relevant factors and in not considering the practical effects of the prior action in Ohio. However, as discussed below, given the applicable standard of review, we address defendant's contentions as a single argument: that the trial court abused its discretion in denying her motion to stay. For the reasons discussed herein, we find no abuse of discretion and affirm.

Analysis

As noted above, defendant argues that the trial court abused its discretion in denying her motion to stay because various findings and conclusions contained in the order are not supported and because the court did not consider the factors relevant to deciding whether to grant a stay. We disagree.

Defendant sought a stay under N.C. Gen. Stat. § 1-75.12, which provides, in pertinent part:

(a) When Stay May be Granted.—If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

N.C.G.S. § 1-75.12 (2009). The essential question for the trial court is whether allowing the matter to continue in North Carolina would

MUTER v. MUTER

[203 N.C. App. 129 (2010)]

work a “substantial injustice” on the moving party. *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, 711, 266 S.E.2d 368, 370, *appeal dismissed and disc. review denied*, 301 N.C. 93, 273 S.E.2d 299 (1980). In making this determination,

the trial court may consider the following factors: (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) (citing *Motor Inn Management, Inc.*, 46 N.C. App. at 713, 266 S.E.2d at 371).

Our Courts have set forth our standard of review in such cases:

When evaluating the propriety of a trial court’s stay order the appropriate standard of review is abuse of discretion. *Home Indem. Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325, 393 S.E.2d 118, 120 (1990), *appeal dismissed and cert. denied*, 327 N.C. 428, 396 S.E.2d 611 (1990). A trial court may be reversed for abuse of discretion only if the trial court made “a patently arbitrary decision, manifestly unsupported by reason.” *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994). Rather, appellate review is limited to “insur[ing] that the decision could, in light of the factual context in which it was made, be the product of reason.” *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986).

Home Indem. Co. v. Hoechst Celanese Corp., 128 N.C. App. 113, 117-18, 493 S.E.2d 806, 809-10 (1997).

The intended operation of the [abuse of discretion] test may be seen in light of the purpose of the reviewing court. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker.

Little, 317 N.C. at 218, 345 S.E.2d at 212. In considering whether to grant a stay under section 1-75.12, the trial court need not consider every factor and will only be found to have abused its discretion

MUTER v. MUTER

[203 N.C. App. 129 (2010)]

when it “abandons any consideration of these factors.” *Lawyers Mut. Liab. Ins. Co.*, 112 N.C. App. at 357, 435 S.E.2d at 573-74. In addition, this Court has held that “it is not necessary that the trial court find that *all* factors positively support a stay[.]” *Id.* at 357, 435 S.E.2d at 574.

Defendant argues that the trial court abandoned consideration of the relevant factors. Our careful review of the order reveals that the trial court, rather than “abandon[ing] any consideration of” the factors suggested in *Lawyers Mutual*, actually made specific findings and conclusions on each of the suggested factors. For example, the order states:

The Court finds the following as to The Factors and Other Practical Considerations regarding the Motion to Stay pursuant to N.C.G.S. §1-75.12:

31. Nature of the Case: This action involves the application for equitable distribution and spousal support, as pleaded by both parties.

32. Applicable Law: North Carolina law applies as to all aspects of this action.

33. Convenience of Witnesses: Those who may testify as to the date of separation and the assets which may be subject to equitable distribution will be predominantly from North Carolina.

34. Process to Compel Witness Attendance: North Carolina law is well suited [sic] to compel attendance of in-state witnesses, and to obtain the testimony of out-of-state witnesses.

35. Ease of Access to Sources of Proof: Because almost all of the assets, both personal and real property, which may be subject to equitable distribution are located in North Carolina, North Carolina offers the easiest access to sources of proof.

The order goes on to include findings 36-40 on the “Burden of Litigating Matters Not of Local Concern,” “Desirability of Litigating Matters of Local Concern,” “Choice of Forum by Plaintiff,” “Convenience of Access to Another Forum,” and six “Other Practical Considerations.” The order tracks the factors and language suggested in *Lawyers Mutual*.

Defendant also argues that various findings and conclusions in the order are not supported. As discussed in detail above, this is not

MUTER v. MUTER

[203 N.C. App. 129 (2010)]

the question we consider on appeal from the trial court's denial of a section 1-75.12 motion to stay. We do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful "not to substitute [our] judgment in place of the [trial court's]" *Little*, 317 N.C. at 218, 345 S.E.2d at 212, we consider only whether the trial court's denial was "a patently arbitrary decision, manifestly unsupported by reason." *Buford*, 339 N.C. at 406, 451 S.E.2d at 298. Defendant makes no argument that the trial court acted in a patently arbitrary manner, but rather argues that the trial court should have resolved the factors differently. Here, as previously stated, the trial court considered each of the relevant factors and made a reasoned finding or conclusion as to each.

We find it useful to reiterate that defendant bore the burden of persuading the trial court that allowing the North Carolina action to proceed would "work a substantial injustice" on her. N.C.G.S. § 1-75.12. Defendant failed to carry this burden. Before the trial court, defendant did not present any evidence or make any argument addressing the relevant factors. In fact, after plaintiff's counsel had presented his arguments as to each of the factors, defendant's counsel advised the trial court that she did not wish to be heard on the factors. The trial court was not required to decide the most convenient or ideal venue for resolving this matter but only to determine whether defendant proved that proceeding in North Carolina would work a substantial injustice on her. Here, we conclude that the trial court did not abuse its discretion in determining that it would not.

Affirmed.

Judges ELMORE and STROUD concur.

BROCK & SCOTT HOLDINGS, INC. v. STONE

[203 N.C. App. 135 (2010)]

BROCK AND SCOTT HOLDINGS, INC., PLAINTIFF V. BENNIE STONE, DEFENDANT

No. COA09-1270

(Filed 16 March 2010)

1. Creditors and Debtors— modification of designation of exempt property—failure to show change of circumstances

Plaintiff failed to show a change of circumstances authorizing modification of the designation of a debtor's exempt property even though plaintiff contended that the value was improperly estimated by defendant debtor. By failing to object in a timely manner, plaintiff effectively assented to the clerk's designation of exempt property. Furthermore, plaintiff did not appeal the clerk's designation of exempt property.

2. Creditors and Debtors— valuation—findings of fact—fair market value

The trial court did not abuse its discretion by allegedly failing to make the proper findings of fact regarding the fair market value of defendant debtor's property. The trial court was not required to make findings of fact beyond those necessary to resolve the material question raised in this case.

Appeal by Plaintiff from order entered 1 July 2009 by Judge Addie H. Rawls in District Court, Harnett County. Heard in the Court of Appeals 22 February 2010.

Richard P. Cook, for Plaintiff-Appellant.

Legal Aid of North Carolina, Inc., by Celia Pistoris, Kenneth Love, and Jennifer Simmons, for Defendant-Appellee.

WYNN, Judge.

A debtor's exemption "may be modified upon a change of circumstances, by motion in the original exemption proceeding, made by the debtor or anyone interested." N.C. Gen. Stat. § 1C-1603(g) (2009). Because Plaintiff offered no evidence of a change in circumstances, we affirm the trial court's denial of Plaintiff's Motion to Modify Designation of Exempt Property.

On 12 July 2007, Plaintiff Brock and Scott Holdings, Inc. filed to recover the outstanding balance owed on the credit card of Defendant Bennie Stone, as well as interest and attorney's fees as

BROCK & SCOTT HOLDINGS, INC. v. STONE

[203 N.C. App. 135 (2010)]

allowed in the cardholder agreement. Defendant was served with the complaint and a summons on 16 July 2007. Defendant failed to appear in the matter or answer the complaint. Plaintiff filed a motion for entry of default and default judgment on 27 August 2007. The motion was granted and judgment entered in favor of Plaintiff on 27 August 2007.

On 29 October 2007, Plaintiff served Defendant with a Notice of Right to Have Exemptions Designated. Defendant filed a Motion to Claim Exempt Property on 15 November 2007. Plaintiff, though properly served with the motion, did not object thereto. On 21 November 2007, the Harnett County Clerk of Superior Court entered an order designating the property listed in Defendant's exemption schedule as exempt from execution. Plaintiff neither moved to set aside nor appealed from the clerk's order which designated these exemptions.

The clerk's order incorporated by reference the exemption schedule filed by Defendant. In the exemption schedule, Defendant listed the estimated value of his residence as \$20,000. Defendant also identified senior liens encumbering the residence which totaled \$21,843.89. Because the exemption schedule indicated there was no equity in the residence, Plaintiff did not seek an order to sell Defendant's property to satisfy its judgment against Defendant.

On 7 January 2009, Plaintiff filed a motion to modify the exemptions of Defendant's real property, claiming a change in circumstances. Specifically, Plaintiff claimed that the real property had a fair market value substantially higher than that which Defendant claimed in the exemption schedule. Plaintiff offered evidence that the tax value of the residence, as identified by the Harnett County Tax Assessor in 2009, was \$66,360. In response, Defendant presented evidence that the County assessed the same value to Defendant's real property in 2007, when the exemption schedule was filed.¹

The trial court denied Plaintiff's motion, noting that "[t]he very evidence the Plaintiff relies upon existed and could have been presented to the Harnett county clerk when she determined the property value." Accordingly, the trial court concluded that there had not been a change in circumstances and, as such, Plaintiff was not entitled to modify Defendant's exemptions. Plaintiff appeals, arguing that

1. See *Clay v. Monroe*, 189 N.C. App. 482, 487, 658 S.E.2d 532, 536 (2008) (permitting the *ad valorem* tax value assessed by a county to serve as evidence of the value of real property).

BROCK & SCOTT HOLDINGS, INC. v. STONE

[203 N.C. App. 135 (2010)]

the trial court abused its discretion by failing to I) modify the exemption or II) make the necessary findings of fact.

I.

[1] A debtor's exemption "may be modified upon a change of circumstances, by motion in the original exemption proceeding, made by the debtor or anyone interested." N.C. Gen. Stat. § 1C-1603(g) (2009). "[T]he use of [the word] 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act." *Campbell v. Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979). "[A] discretionary order of the trial court is conclusive on appeal absent a showing of abuse of discretion." *Privette v. Privette*, 30 N.C. App. 41, 44, 226 S.E.2d 188, 190 (1976). Thus, we review the order of the trial court for an abuse of discretion.

To understand the backdrop against which the trial court exercised its discretion, we begin with a brief outline of the relevant statutory procedure utilized to set aside exempt property. After judgment, and prior to the issuance of a writ of execution or possession, the judgment creditor must serve notice on the judgment debtor advising him of his statutory rights to certain exemptions from the judgment. N.C. Gen. Stat. § 1C-1603(a)(4) (2009). Once served, the judgment debtor can "either file a motion to designate his exemptions with a schedule of assets or may request . . . a hearing before the clerk to claim exemptions." N.C. Gen. Stat. § 1C-1603(e)(1) (2009). When, as in this matter, the judgment creditor "designates his exemptions by filing a motion and schedule of assets," he must serve a copy of the motion and schedule on the judgment creditor. N.C. Gen. Stat. § 1C-1603(e)(3) (2009). "The judgment creditor has 10 days from the date served with a motion and schedule of assets . . . to file an objection to the judgment debtor's schedule of exemptions." N.C. Gen. Stat. § 1C-1603(e)(5) (2009). "If the judgment creditor files no objection to the schedule filed by the judgment debtor or claimed at the requested hearing, the clerk shall enter an order designating the property allowed by law and scheduled by the judgment debtor as exempt property." N.C. Gen. Stat. § 1C-1603(e)(6) (2009).

The record in this case indicates that the procedures laid out above were followed without deviation. At no point did Plaintiff object to the Defendant's motion designating exemptions, so the clerk entered an order exempting all property allowed by law and scheduled by Defendant. The matter before this Court arose when Plaintiff, more than a year later, filed a motion to modify the exemp-

tion order. As grounds for modification, Plaintiff alleged a change in circumstances. In light of the reports from the Harnett County Tax Assessor indicating that the value of the home had not changed since the clerk's initial designation of exemption, the district court judge denied Plaintiff's motion to modify.

Plaintiff contends on appeal that the trial court erred by denying this motion because Defendant's real property has a value (\$66,360) substantially exceeding that which was designated on the schedule of assets (\$20,000). However, Plaintiff presented no evidence indicating a *change* in value, instead essentially arguing that the value was improperly estimated by Defendant upon filing the exemption schedule with the clerk. Notably, statutory provisions exist whereby a judgment creditor, upon objection to the exemption schedule, is entitled to a hearing before a district court judge for the purpose of valuing the property and designating appropriate exemptions. *See* N.C. Gen. Stat. § 1C-1603(e)(7)-(9) (2009). By failing to object in a timely manner, Plaintiff effectively assented to the clerk's designation of exempt property. Furthermore, Plaintiff did not appeal the clerk's designation of exempt property, which also would have afforded an additional opportunity for review by the district court judge. *See* N.C. Gen. Stat. § 1C-1603(e)(12) (2009) ("Appeal from a designation of exempt property by the clerk is to the district court judge. A party has 10 days from the date of entry of an order to appeal."). Thus, Plaintiff fails to show how there has been a "change of circumstances" authorizing the district court judge to modify the designation of exempt property. Accordingly, Plaintiff's argument is without merit.

II.

[2] Plaintiff also argues that the district court abused its discretion by failing to make the proper findings of fact regarding the fair market value of Defendant's property. This argument confuses the task of the district court judge hearing a motion to modify a debtor's exemption. In such a proceeding, the role of the trial court is to decide whether a change of circumstances exists which justifies modification.² As the moving party, it was incumbent upon Plaintiff to offer evidence establishing the existence of such a change. Yet, the only

2. This is in contrast to a proceeding instituted in response to a judgment creditor's objection to a proposed exemption schedule. *See* N.C. Gen. Stat. § 1C-1603(e)(7) (2009). Upon such an objection by a judgment creditor, the district court is statutorily required to "determine the value of the property" and may "appoint a qualified person to examine the property and report its value." N.C. Gen. Stat. § 1C-1603(e)(8) (2009).

BROCK & SCOTT HOLDINGS, INC. v. STONE

[203 N.C. App. 135 (2010)]

evidence offered to persuade the court was a tax assessment which, upon further review, identified the value of the subject property to be the same as it was when the clerk initially designated the property exempt. The trial court found as fact that the “motion to modify has not been supported by new evidence from which a change in value could be found.” *Cf.* N.C. Gen. Stat. § 1C-1603(g) (2009) (“A substantial change in value may constitute changed circumstances.”). The trial court is not required to make findings of fact beyond those necessary to resolve the material question raised in this case. *See Witherow v. Witherow*, 99 N.C. App. 61, 66, 392 S.E.2d 627, 631 (1990), *aff’d*, 328 N.C. 324, 401 S.E.2d 362 (1991). To require the trial court in this instance to make findings regarding the past and present values of Defendant’s property would have the untenable consequence of shifting the burden of production to the trial court. Instead, we find that the trial court did not abuse its discretion in this case; accordingly, Plaintiff’s argument is without merit.

Nonetheless, Plaintiff further contends that affirming the trial court in this case will have the unintended consequence of encouraging the misrepresentation of property values by judgment debtors. However, as noted above, if a judgment creditor objects to the debtor’s valuation, statutory relief is granted in the form of a hearing before a district court judge in which the valuation of the property can be thoroughly conducted. Furthermore, any designation of exempt property, whether by the clerk or the district court, is appealable. In light of these legislatively created opportunities to challenge the property values represented by judgment debtors, we find no merit to Plaintiff’s argument.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

IN RE A.S.

[203 N.C. App. 140 (2010)]

IN THE MATTER OF: A.S.

No. COA09-1386

(Filed 16 March 2010)

1. Child Abuse and Neglect— fitness and availability to care for child—sufficiency of findings of fact

Although the trial court properly concluded in a child neglect case that the paternal grandmother was not fit and available to care for the minor child, the order failed to contain findings as to the fitness of respondent father to parent the child. The order was reversed and remanded for a new hearing.

2. Child Abuse and Neglect— reunification—reasonable efforts

The trial court erred in a child neglect case by failing to ensure that petitioner DSS used reasonable efforts to reunify the child with either parent. There was no evidence to support the finding that further efforts to reunify would be futile.

3. Child Abuse and Neglect— cessation of reunification efforts—sufficiency of findings of fact

The trial court erred in a child neglect case by ceasing reunification efforts without making the appropriate findings required by N.C.G.S. § 7B-507.

Appeal by Respondents from order entered 17 July 2009 by Judge J. Stanley Carmical in Robeson County District Court. Heard in the Court of Appeals 22 February 2010.

No brief filed for Robeson County Department of Social Services, Petitioner-Appellee.

Richard E. Jester, for Respondent-Appellant Father.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Annick Lenoir Peek, Respondent-Appellant Mother.

Pamela Newell Williams, for Guardian ad Litem.

BEASLEY, Judge.

Respondents are the parents of four children, the youngest of which is A.S.¹ (hereinafter referred to as Adam), the subject of the

1. Adam is used to protect the identity of the juvenile.

IN RE A.S.

[203 N.C. App. 140 (2010)]

present appeal. On 18 June 2007 the Robeson County Department of Social Services (hereinafter referred to as Petitioner) filed a juvenile petition alleging that Adam was a neglected juvenile. On 24 August 2007 the court filed an order adjudicating Adam as a neglected juvenile. This Court affirmed the adjudication of Adam and remanded the disposition portion of the order for further findings of fact. *In re A.S.*, 190 N.C. App. 679, 661 S.E.2d 313 (2008), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009). On 1 July 2009 the court held a hearing for the purpose of reviewing with the parties a proposed order it had drafted in response to this Court's mandate. After receiving input from the parties, the court made some changes and on 17 July 2009 it filed an "Order on Disposition" which continued custody of Adam with Petitioner and changed the permanent plan from reunification to guardianship with a court-approved caretaker. Respondents appealed.

[1] Respondent mother argues that the trial court erred in granting custody of Adam to Petitioner when both Respondent father and paternal grandmother were fit and available to care for him. Respondent father further argues that the trial court erred by awarding custody to anyone other than Respondent father in the absence of evidence or findings of fact and conclusions of law declaring Respondent father to be an unfit parent.

As a condition for receiving federal funding of foster care and adoption assistance, a state is required, *inter alia*, to have a plan for foster care which "provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards." 42 U.S.C. § 671(a)(19) (2009). Consistent with this mandate, our statutes contain several provisions which direct a juvenile court to consider placement with a relative as a first priority. An example of one provision is contained in N.C. Gen. Stat. § 7B-505 (2009), which provides that in entering a custody order or other order for placement outside the home, the court "shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." If such relative is available, then "the court shall order placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile." N.C. Gen. Stat. § 7B-505 (3) (2009). Failure to make specific findings of fact explaining the placement with the relative is not in the juvenile's

IN RE A.S.

[203 N.C. App. 140 (2010)]

best interest will result in remand. *In re L.L.* 172 N.C. App. 689, 704, 616 S.E.2d 392, 401 (2005).

By its fifth finding of fact in the instant order the trial court found:

That [Adam] does not have any other relatives available for placement at this time that are known to the Robeson County Department of Social Services or that would be able to provide proper care and supervision of [Adam] in a safe home; that during the proceedings involving [Adam's] siblings evidence was presented to the court regarding a grandparent of the children who resides in Robeson County; that the court notes however that the undersigned determined that the grandparent was not an appropriate placement for the siblings due to evidence that the grandparent would not adequately supervise the children from the risk posed by the parents; that court finds that the same reasoning should be applied to consideration of that grandparent in [Adam's] case.

The foregoing finding is the only such finding the court made regarding the fitness of the paternal grandparent to be a custodial parent. As noted within the finding, the court relied heavily upon its finding in proceedings involving Adam's siblings that the paternal grandparent is not an appropriate placement.

We take judicial notice of our records, including appeals that have involved Adam's siblings and the same trial judge. In the most recent appeal we held that the evidence failed to support a finding that neither Respondent father nor the paternal grandmother will be unable to prevent Mother from having unauthorized or unsupervised contact with the children. *In re I.N.B., T.N.B., D.N.B.*, 2009 N.C. App. LEXIS 1672 (No. COA09-742, filed 20 October 2009, unpublished). In the instant order the court expressly relied upon this disavowed finding in making its above-quoted fifth finding of fact.

We also held in our 20 October 2009 opinion that the court erred in granting guardianship of the siblings to a non-relative without finding that Respondent father has acted inconsistently with his constitutional right to parent his children or that he is unfit to parent his children. We noted that the testimony of Petitioner's social worker showed that Respondent father "had not shown any behavior or any type of conduct inconsistent with fully complying with every request petitioner had made of him." *Id.* slip opinion at p. 13. The

IN RE A.S.

[203 N.C. App. 140 (2010)]

social worker testified that Respondent mother had moved out of the home at Respondent father's request "when it became clear that her presence in his home was an impediment to the return of the juveniles to his care." *Id.* slip opinion at p. 12. We also stated that the court's finding "that it is 'highly likely' that respondent-father failed to protect the juvenile from abuse or neglect on other occasions is entirely unsupported by any evidence in the record." *Id.* slip opinion at pp. 13-14. We conclude that the present order shares the same deficiency in its failure to contain findings as to the fitness of Respondent father to parent the children.

[2] Respondent mother next contends that the trial court erred by failing to ensure that Petitioner used reasonable efforts in reunifying the child with either parent. For the purposes of the Juvenile Code, "[r]easonable efforts" are defined as:

The diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile.

N.C. Gen. Stat. § 7B-101(18) (2009). In our opinion filed 20 October 2009, we held that Petitioner had not used reasonable efforts in attempting to reunify Adam's siblings with their parents. *In re I.N.B.*, slip opinion at pp. 13-14. The present record is void of any effects Petitioner has made to attempt to reunify Adam with his parents other than continued insufficient efforts Petitioner has made to reunify his siblings with the parents. The record does contain a family assessment of strengths and needs prepared on 23 July 2007 which indicates that Respondent mother's greatest strengths are good coping skills, good parenting skills, access to a strong support network, and utilization of community resources. In contrast, the report shows that Respondent mother's only negative factor was her lack of employment. The court noted the foregoing strengths in finding of fact number eleven. Nevertheless, despite finding that Respondent mother has these strengths, it found that further efforts to reunify Adam with his parents would be futile. We can find no evidence to support the finding that further efforts to reunify would be futile.

WALLACE FARM, INC. v. CITY OF CHARLOTTE

[203 N.C. App. 144 (2010)]

[3] Respondent mother also contends that the trial court erred in ceasing reunification efforts without making the appropriate findings required by N.C. Gen. Stat. § 7B-507 (2009). This statute requires a court to make one of four findings before placing a child in the custody of a county department of social services, including a finding that “reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court” finds that “[s]uch efforts clearly would be futile or would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time[.]” N.C. Gen. Stat. § 7B-507(b)(1) (2009). Although the court made a finding of fact that reunification with either of the parents would be futile and inconsistent with Adam’s health and safety and his need for a safe and permanent home, we hold, for reasons stated above, that this finding is not supported by the evidence.

For the errors committed, we reverse the trial court’s order and remand this matter for a new hearing.

Reversed and remanded.

Judges WYNN and HUNTER JR. concur.

WALLACE FARM, INC., PLAINTIFF V. CITY OF CHARLOTTE AND CURT WALTON,
DEFENDANTS

No. COA09-939

(Filed 16 March 2010)

**Public Records— request—trial preparation materials—not
subject to inspection**

The trial court did not abuse its discretion by denying plaintiff the opportunity to inspect certain records it had requested from the City of Charlotte under the Public Records Act because the documents contained mental impressions, conclusions, opinions, or legal theories of City attorneys or other agents of the City that had been prepared in reasonable anticipation of litigation.

WALLACE FARM, INC. v. CITY OF CHARLOTTE

[203 N.C. App. 144 (2010)]

Appeal by plaintiff from memorandum and order entered 6 January 2009 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 2010.

The Odom Firm, PLLC, by T. LaFontine Odom, Sr., Thomas L. Odom, Jr., and David W. Murray, for plaintiff-appellant.

City of Charlotte, Office of the City of Attorney, by Senior Assistant City Attorney S. Mujeeb Shah-Khan, for defendant-appellees.

BRYANT, Judge.

Plaintiff Wallace Farm, Inc., appeals from a memorandum and order entered after the Mecklenburg Superior Court conducted an *in camera* review of public records provided by the City of Charlotte and ordered that 225 documents were trial preparation materials and not subject to inspection by plaintiff. For the reasons stated herein, we affirm.

On 30 September 2008, Charlotte zoning inspectors, by authority of an administrative warrant, searched Wallace Farm following complaints of odor emanating from the farm's composting facility and allegations that Wallace Farm had grown beyond the parameters set by the 1999 zoning regulations.

On 15 October 2008, plaintiff mailed to the Office of the Charlotte City Manager a request to examine all public records from the last ten years—1998 through 2008—that referred to plaintiff's property, including but not limited to complaints against and subsequent investigation of plaintiff's composting facility, meetings between city, state, and federal personnel regarding neighborhood development, and zoning code enforcement. Lacking a response, plaintiff sent a follow-up request to review the documents on 27 October. On 31 October, the Charlotte City Attorney's Office sent notice to plaintiff that City Manager Curt Walton relayed the public records request to the City Attorney's Office and the City Attorney's Office would comply with the request pursuant to the obligations of N.C. Gen. Stat. § 132-1 *et seq.* On 3 November 2008, plaintiff filed a complaint against the City of Charlotte and City Manager Curt Walton (defendants) to compel production of the requested public records. A hearing was set for 18 December 2008.

Defendants provided plaintiff with 8,241 pages of public documents on 24 November 2008; 10,183 pages of documents on 4 Decem-

WALLACE FARM, INC. v. CITY OF CHARLOTTE

[203 N.C. App. 144 (2010)]

ber 2008; and on 11 December 2008, approximately 3,000 pages for a total of 21,424 pages. However, defendants withheld approximately 500 pages on grounds that the City reasonably anticipated litigation and the materials “withheld from review contain mental impressions, conclusions, opinions, or legal theories of individuals in the City Attorney’s Office concerning the potential litigation” On 6 January 2009, after reviewing the withheld pages *in camera* in order to decide whether they should be provided to plaintiff, the trial court entered a memorandum and order in which it ruled that the 500 pages comprising 225 documents were trial preparation materials and therefore not public records subject to inspection by plaintiff. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred by failing to allow plaintiff to inspect the public records because the records were not trial preparation materials and failing to allow the inspection operated in opposition to the North Carolina Public Records Act. We disagree.

We review the trial court’s ruling for abuse of discretion. *See Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 329, 595 S.E.2d 759, 765 (2004) (“A trial court’s determination regarding relevance for purposes of discovery may be reversed only upon a showing of an abuse of discretion.”).

Our Public Records Act, codified in Chapter 132 of our General Statutes “provides for liberal access to public records.” *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999) (citation omitted). “The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records . . . unless otherwise specifically provided by law.” N.C. Gen. Stat. § 132-1(b) (2007). “Exceptions and exemptions to the Public Records Act must be construed narrowly.” *Carter-Hubbard Publ’g Co. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006) (citation omitted). Under our General Statutes, section 132-1.9, “a custodian may deny access to a public record that is also trial preparation material.” N.C. Gen. Stat. § 132-1.9(b) (2007).

Under our Rules of Civil Procedure “[a] court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning

WALLACE FARM, INC. v. CITY OF CHARLOTTE

[203 N.C. App. 144 (2010)]

the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.” N.C. R. Civ. P. 26(b)(3) (2007).

[T]he party asserting work product privilege bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent.

Evans v. United Servs. Auto. Ass’n, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001) (citations and internal quotations omitted).

Although not a privilege, the exception is a qualified immunity and extends to all materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s consultant, surety, indemnitor, insurer, or agent. The protection is allowed not only for materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected, nor does the protection extend to facts known by any party.

Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 673 S.E.2d 694, 702 (2009) (citations, quotations, and emphasis omitted).

Here, in the 15 December 2008 letter from defendants to plaintiff, defendants contend the documents withheld “were prepared in anticipation of a legal proceeding yet to commence.” Specifically, defendants “contend that if it takes any action against [Wallace Farm], be it via the City beginning enforcement proceedings for possible Zoning Ordinance violations, or the odor study results being submitted to any party, litigation is reasonably anticipated to follow.” At the 18 December 2008 hearing to compel production of public records, defendants argued that the materials withheld “all related to the City’s research and the City’s taking a look at legal strategies related to possible zoning enforcement, not with respect to any of the claims that the plaintiff suggest they might pursue against the City with respect to the September 30, 2008 administrative inspection.” Upon review, including in camera review of the withheld documents, we agree with the trial court’s ruling and hold the challenged documents contain mental impressions, conclusions, opinions, or legal theories

WALLACE FARM, INC. v. CITY OF CHARLOTTE

[203 N.C. App. 144 (2010)]

of city attorneys or other agents of the City in reasonable anticipation of litigation. Therefore, we hold that the trial court did not abuse its discretion in concluding the public records exception under N.C. Gen. Stat. § 132-1.9 applies. Accordingly, we overrule plaintiff's assignment of error.

Affirmed.

Judges JACKSON and HUNTER, Jr., Robert N. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 MARCH 2010)

APGAR v. CRAWFORD No. 09-362	Haywood (07CVS371)	Vacated and remanded
BENBOW & ASSOCS. v. ALTAMONT DEV. No. 09-138	Buncombe (08CVS775)	Affirmed
HANSER v. STONEHOUSE No. 09-1142	Forsyth (07CVS8358)	Affirmed
IN RE A.M.M. No. 09-1321	Dare (08JT32)	Affirmed
IN RE J.S., C.Y., & M.Y. No. 09-1302	Mecklenburg (04JT552-554)	Affirmed
IN RE L.A.H., J.R.H., J.L.H. No. 09-1258	Lincoln (06JT143-145)	Affirmed
IN RE M.A.P. & S.A.P. No. 09-1350	Orange (07JT5-6)	Affirmed in Part and Reversed in Part
IN RE S.E.W. & J.A.W. No. 09-1267	McDowell (08JT29-30)	Reversed and Remanded
IN RE Z.A.D.K. & T.J.P.K. No. 09-1266	Mecklenburg (07JT562-563)	Affirmed
NESBIT v. CRIBBS No. 09-886	Macon (07CVD199)	Affirmed in part, Reversed and Remanded in part
STARLING v. ALEXANDER PLACE TOWNHOME No. 09-640	Wake (08CVS8133)	Affirmed
STATE v. ALLEN No. 09-1259	Beaufort (07CRS52684)	No Error
STATE v. ANDERSON No. 09-763	Wake (07CRS56713)	No Error
STATE v. BONNER No. 09-1126	Pasquotank (07CRS52398)	Affirmed
STATE v. BROUSSARD No. 09-1197	Durham (08CRS10954) (08CRS48953)	New trial
STATE v. FREEMAN No. 09-794	Martin (07CRS1381) (07CRS1382) (07CRS1380)	Remanded for new sentencing hearing

STATE v. FRISBY No. 09-812	Union (07CRS56671) (07CRS56672) (07CRS56670)	No Error
STATE v. GRAHAM No. 09-601	Scotland (07CRS53038)	No Error
STATE v. KIZER No. 09-725	Wake (05CRS104759) (05CRS104760) (05CRS104758)	Affirmed
STATE v. PARNELL No. 09-909	Bladen (08CRS50461)	No prejudicial error
STATE v. SIZEMORE No. 07-1489-2	Macon (05CRS50963) (05CRS50964) (05CRS50962)	No Error
STATE v. WILLIAMS No. 09-493	Onslow (06CRS57361) (06CRS57360)	No Error
STATE v. WOOD No. 09-938	Sampson (08CRS713)	No Error
TARASI v. JUGIS No. 09-1252	Mecklenburg (09CVS7560)	Affirmed

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

STATE OF NORTH CAROLINA v. GENE WAYNE HAYMOND

No. COA09-1030

(Filed 6 April 2010)

1. Criminal Law— motion to suppress—search warrant—sufficient probable cause

The trial court did not err in denying defendant's motion to suppress evidence seized pursuant to a search warrant because, even considering allegedly material facts which defendant contended were intentionally omitted from the application for the warrant, the application was sufficient to establish probable cause to believe the stolen items listed would be found in defendant's home.

2. Criminal Law— motion to suppress—search warrant—items not listed—plain view doctrine

The trial court did not err in denying defendant's motion to suppress certain items obtained during a search of his residence that were not listed on the search warrant because the police were given consent by the owner of the residence to search some of the items to determine if they were stolen and the remaining items were admissible under the plain view doctrine.

3. Criminal Law— defendant's right to testify—not impermissibly chilled

The trial court did not impermissibly chill defendant's right to testify in his own defense. The trial court's instruction that statements made by defendant at a hearing concerning a plea agreement could be used against him at trial if he testified was not erroneous as the statements were not made during a hearing on a motion to suppress and were not made during the course of plea negotiations. Furthermore, the trial court did not err in concluding that defendant's statements were confessions that could be used against him at trial.

4. Criminal Law— motion to dismiss—sufficiency of the evidence—breaking or entering

The trial court erred by denying defendant's motion to dismiss three charges of breaking or entering as the State failed to offer sufficient evidence that defendant either broke or entered the three residences. The trial court did not err in denying defendant's motion to dismiss a fourth charge of breaking or enter-

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

ing as the State presented sufficient evidence that defendant entered the fourth residence.

5. Sentencing— reasonable inference—impermissibly based on defendant’s insistence on jury trial

It could be reasonably inferred from the trial court’s statements that it impermissibly sentenced defendant based, at least in part, on defendant’s decision to refuse the State’s plea offer. Defendant was entitled to a new sentencing hearing.

Appeal by defendant from judgments signed 13 August 2008 by Judge Henry E. Frye, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 11 January 2010.

Roy Cooper, Attorney General, by Gerald K. Robbins, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in true bills of indictment returned by the Wilkes County Grand Jury with the following offenses:

07 CRS 881 Count I. Felonious Breaking or Entering of a building occupied by William Pelon in violation of N.C.G.S. § 14-54(a).

Count II. Felonious Larceny of William Pelon’s property pursuant to the breaking or entering in violation of N.C.G.S. § 14-72(b)(2).

08 CRS 1474 Felonious Possession of stolen property belong to William Pelon in violation of N.C.G.S. § 14-71.1

07 CRS 886 Count I. Felonious breaking or entering of a building occupied by Jeffrey Ritch in violation of N.C.G.S. § 14-54(a).

Count II. Felonious Larceny of Jeffrey Ritch’s property pursuant to the breaking or entering in violation of N.C.G.S. § 14-72(b)(2).

08 CRS 1470 Felonious Possession of stolen property belonging to Jeffrey Ritch in violation of N.C.G.S. § 14-71.1.

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

07 CRS 50460 Count I. Felonious breaking or entering of a building occupied by Sherry Gambill in violation of N.C.G.S. § 14-54(a).

Count II. Felonious Larceny of Sherry Gambill's property pursuant to the breaking or entering in violation of N.C.G.S. § 14-72(b)(2).

08 CRS 1472 Felonious Possession of stolen property belonging to Sherry Gambill in violation of N.C.G.S. § 14-71.1.

07 CRS 50466 Count I. Felonious breaking or entering of a building occupied by Lowe Fur and Herb, Inc. in violation of N.C.G.S. § 14-54(a).

Count II. Felonious Larceny pursuant to the breaking or entering of personal property belong to Lowe Fur and Herb, Inc., Arthur Lowe, and Arthur Lowe, Jr. in violation of N.C.G.S. § 14-72(b)(2).

Count III. Felonious safecracking in violation of N.C.G.S. § 14-89.1.

08 CRS 1475 Felonious Possession of stolen property belonging to Lowe Fur and Herb, Inc. in violation of N.C.G.S. § 14-71.1.

08 CRS 1471 Felonious Possession of stolen property belonging to Robert Mittet in violation of N.C.G.S. § 14-71.1.

08 CRS 1473 Felonious Possession of a Firearm by a Felon in violation of N.C.G.S. § 14-415.1.

08 CRS 108 Attaining the status of an Habitual Felon in violation of N.C.G.S. § 14-7.1.

Defendant appeared, with counsel, before the trial court at a hearing on 7 January 2008, at which time the State offered defendant a plea arrangement. Defendant requested to address the court, but before allowing him to do so, the trial court advised defendant that any statement made by him could be used against him. Defendant initially requested a continuance in order to employ different counsel, and then made statements to the court in which he admitted complicity and asked the trial court, in light of his cooperation with the authorities, to impose a lesser sentence than that offered by the prosecutor. The trial court refused to do so and advised defendant as to the consequences of accepting or rejecting the plea arrangement offered by the State. Defendant was given a further opportunity to

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

discuss the plea arrangement with his counsel over the evening recess. On the following day, defendant rejected the plea arrangement. Defendant subsequently waived his right to the assistance of counsel and proceeded *pro se*.

Defendant moved to suppress all evidence seized as a result of a search by law enforcement officers, pursuant to a search warrant, of a residence at 515 Corporation Street, Wilkesboro, North Carolina. Defendant alleged that the application for issuance of the search warrant was insufficient to establish probable cause for its issuance.

The evidence at the suppression hearings tended to show that in January 2007, Detective Peyton Colvard (“Detective Colvard”) of the Ashe County Sheriff’s Department was investigating a break-in of New River Outfitters and larceny of items therein, which occurred in late December 2006 or early January 2007. On 19 January 2007, while processing the scene for latent fingerprints, Detective Colvard found a business card and vehicle registration in the leaves outside the back door of New River Outfitters. Both items contained defendant’s name and the address 515 Corporation Street, Wilkesboro, North Carolina. After discussing this evidence with other officers, Detective Colvard recalled that defendant had been involved in prior break-ins in Ashe County. Detective Colvard then called Captain John Summers (“Captain Summers”) of the Wilkes County Sheriff’s Department and asked him to ride by the address shown on the cards, which was in Wilkes County, to see if he could identify any items that had been stolen from New River Outfitters. When Captain Summers rode by the house, the only item he spotted was a stainless steel grill sitting on the porch.

When Detective Colvard heard about the grill, he recalled that a stainless steel grill had been taken from the summer home of Randy Miller (“Mr. Miller”) in mid-December 2006. Suspecting the grill spotted on the porch of the house might be Mr. Miller’s, Detective Colvard contacted Mr. Miller and requested that he drive by the house to see if he could identify it. When Mr. Miller drove by the house, he was “80 percent sure” the grill on the porch was his. On 22 January 2007, Detective Colvard took Mr. Miller back to the house. On this occasion, both Detective Colvard and Mr. Miller got out of the car and walked through the yard to the porch. At this point, Mr. Miller positively identified the grill as the one stolen from his vacation home.

Detective Colvard then applied for a search warrant for 515 Corporation Street, Wilkesboro, North Carolina. In his Probable

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

Cause Affidavit, Detective Colvard provided the magistrate with the information concerning the discovery of defendant's business card and vehicle registration at New River Outfitters. He also indicated that he had "observed a coastal stainless steel grill on [defendant's] side porch" and that "this grill matched the description of a grill stolen on December 23, 2006." As additional information, Detective Colvard indicated that the victim "identified the grill as being his" after going by defendant's house. According to Detective Colvard, "[t]he victim was certain of this because of a black bungee cord that he had applied to the grill." Finally, Detective Colvard indicated his familiarity with defendant's prior convictions for breaking or entering. Based on this information, the magistrate issued a search warrant for defendant's home, authorizing Detective Colvard to search for the grill and various items stolen from New River Outfitters.

Soon after obtaining the search warrant, Detective Colvard contacted Detective William David Carson ("Detective Carson") to help execute the search warrant. Since defendant's home was located in Wilkesboro, Lieutenant Rhodes of the Wilkesboro Police Department was called to assist in the search as well. When the detectives arrived, no one was at home. They attempted to contact Dawn Matthews ("Ms. Matthews"), the owner of the house, but could not get in touch with her. They then called the number on the business card found at New River Outfitters, and defendant answered. They told defendant they had a warrant to search his house and instructed him to return to his home. Two hours later, defendant arrived at the house, and Detective Colvard served him with the search warrant. Defendant read over the search warrant and indicated that "almost all" of the items on the search warrant were in the house.

Defendant let the officers into the house. The officers searched various rooms in the house, including the basement and the kitchen. They found many of the items identified on the search warrant. They also found numerous other items that were identified as items taken during various reported break-ins in Wilkes County. In the weeks following the search, defendant recovered and returned various other stolen items to the officers, including rifles and parts of a safe which had all been stolen from Lowe Fur and Herb, Inc. Some of the items recovered were determined to be those taken during break-ins of William Pelon's ("Mr. Pelon") residence, Jeffrey Ritch's ("Mr. Ritch") residence, Sherry Gambill's ("Ms. Gambill") residence, and the Lowe Fur and Herb, Inc. business. A computer was found that was determined to have been stolen from Robert Mittet ("Mr. Mittet").

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

The trial court concluded that the application for the search warrant was sufficient to establish probable cause to search the residence for evidence relating to the Ashe County break-ins and that all of the other items seized, relating to the Wilkes County break-ins, were in plain view of the officers, with the exception of a television set which the officers moved in order to ascertain a serial number and some clothing which the officers found in closed drawers. Thus, the motion to suppress was denied except as to the television and the clothing, which were excluded.

In addition, defendant moved to suppress evidence of a letter dated 9 November 2007 which he directed to an assistant district attorney, various statements which he made to police officers during both the search of his house and plea discussions, and the statements which he made during the 7 January 2008 court appearance. The trial court ruled that the letter and statements made by defendant during plea discussions were inadmissible; however, the court ruled that defendant's statements made during the search were admissible because defendant was not under arrest at the time they were made, requiring no *Miranda* warning. The statements made by defendant at the 7 January 2008 hearing were also ruled admissible but only for impeachment purposes.

The State's evidence at trial was substantially the same as Detective Colvard's testimony with respect to his investigation of the New River Outfitters break-in and the subsequent search and seizure of stolen items from defendant's residence. Mr. Pelon testified that he owned a second home in Wilkes County and that he was having some remodeling work done on the house in June 2006. In that month, the house was broken into and personal property belonging to Mr. Pelon, as well as some tools belonging to his contractor, were stolen. The State offered evidence that a number of the stolen items were found at defendant's home, and others at the home of Jeremy Ebersole, a co-defendant who was tried separately.

Ms. Gambill testified that her home was broken into on or about 15 August 2006 and that a Jen-Air stove, a lawnmower and other personal property was taken. The State offered evidence that the stove was recovered from defendant's home and that defendant himself returned the lawn mower to the Sheriff's department. Daniel Richter testified that he and defendant went to Ms. Gambill's house; Richter went into the house through either a door or a window and took a Jen-Air stove, riding lawnmower, a ladder and some hoses. The items

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

were quickly loaded into defendant's van and they went back to defendant's house, where defendant paid Richter \$250.

Richter also testified that he broke into Mr. Mittet's house in June 2006 and took a laptop computer, which he sold to defendant. Richter testified that he told defendant the computer had been stolen.

Sometime during August 2006, a vacation home owned by Mr. Ritch was broken into and various items of furniture, a stove, refrigerator, microwave, and dishwasher were stolen. These items were recovered during the search of defendant's residence.

Lowe's Fur and Herb, Inc. was broken into on 24 November 2006 and various items were stolen, including articles of Carhartt clothing which was part of the company's inventory. In addition, the safe had been broken into and blank checks, invoices, stock certificates and other documents stolen therefrom. In addition, two guns belonging to Arthur Lowe, the owner of the business, were stolen. The clothing was found during the search of defendant's residence, and, following the search, defendant returned the firearms and other documents, which had been taken from the safe, to the sheriff's department.

At the close of the State's evidence, the trial court dismissed the charge of safecracking, but denied defendant's motions to dismiss the remaining charges. Defendant neither testified nor offered evidence in his own behalf, and renewed his motions to dismiss, which were again denied. The jury returned verdicts of guilty on each of the substantive offenses.

Defendant stipulated to having been convicted of the felony of third degree burglary in the State of Delaware on 12 June 1992 for an offense which occurred on 2 September 1991, of felonious breaking or entering and felonious larceny in Watauga County, North Carolina, on 7 September 2000 for an offense which occurred on 12 September 1999, and of felonious larceny in Wilkes County, North Carolina, on 5 June 2001 for an offense which occurred on 25 October 2000. The jury then found defendant guilty of having attained the status of an habitual felon. The trial court arrested judgment on each of the felonious larceny convictions. The trial court then determined that defendant had eight prior record level points and a prior record level of III, and entered judgment sentencing defendant in the presumptive range to a minimum term of 116 months and a maximum term of 149 months as an habitual felon for each of the ten felonies, to be served consecutively. Defendant appeals.

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

I.

[1] We first consider defendant's contention that the trial court erred in denying his motion to suppress evidence seized pursuant to the search warrant. "[A]ppellate review of a ruling upon a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994).

Defendant's primary contention is that Detective Colvard intentionally omitted material facts from his application for the search warrant, which facts, if they had been included, would have disclosed that no probable cause existed. In the record before us, it does not appear that the trial court made specific findings of fact with respect to the alleged omission of facts from the probable cause affidavit, other than noting that there was no fabrication on the part of Detective Colvard. However, "[w]here there is no material conflict in the evidence, findings and conclusions are not necessary even though the better practice is to find facts." *State v. Edwards*, 85 N.C. App. 145, 148, 354 S.E.2d 344, 347, *cert. denied*, 320 N.C. 172, 358 S.E.2d 58 (1987). Thus, we must only consider whether the trial court's conclusions are supported by the evidence.

It is well settled "that a search warrant be based on probable cause." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997). "Probable cause for a search [warrant] is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *Id.* Inherent in the showing of probable cause "is that there will be a *truthful* showing." *Franks v. Delaware*, 438 U.S. 154, 164-65, 57 L. E. 2d 667, 678 (1978), *on remand*, 398 A.2d 783 (Del. Supr. 1979). "Truthful" in this context "does not mean . . . that every fact recited in the warrant affidavit is necessarily correct." *Id.* at 165, 57 L. E. 2d at 678. However, the factual showing offered in support of probable cause should "be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Id.*

Though there is "a presumption of validity with respect to the affidavit supporting the search warrant," *id.* at 171, 57 L. E. 2d at 682, a defendant "may [still] challenge the truthfulness of the testimony showing probable cause." *State v. Steen*, 352 N.C. 227, 243-44, 536

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

S.E.2d 1, 11 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). The United States Supreme Court set forth the process and standard for making such a challenge by stating:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155-56, 57 L. Ed. 2d 672. Thus, a defendant must "establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith." *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358. He cannot rely on evidence that merely "contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements." *Id.* Moreover, even if the defendant establishes that the affiant alleged the facts in bad faith, the warrant will not be voided if the remaining unchallenged factual allegations sufficiently establish probable cause for the search. *See Franks*, 438 U.S. at 155-56, 57 L. Ed. 2d at 672; *see also State v. Rashidi*, 172 N.C. App. 628, 634-35, 617 S.E.2d 68, 73 (holding that the search warrant was not void when the defendant failed to show that the alleged false statements were material), *aff'd per curiam*, 360 N.C. 166, 622 S.E.2d 493 (2005).

Defendant's motion to suppress evidence was based on the fact that, on its face, the search warrant failed to establish probable cause to search. Defendant did not allege that Detective Colvard's statements were made with "deliberate falsehood or [with] reckless disregard for the truth," and the trial court was not required to grant defendant a hearing on this issue. *Franks*, 438 U.S. at 171, 57 L. E. 2d at 682 (stating that, in order to "mandate an evidentiary hearing, . . . [t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof"). Even so, our review discloses that the trial court did, in fact, grant defendant a hearing in accordance with *Franks* and

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

ultimately concluded that “[t]here was no fabrication or any wrongdoing by” Detective Colvard.

The search warrant must be voided only if, after setting aside any false material, the affidavit fails to provide sufficient probable cause for the search. *Id.* at 156, 57 L. E. 2d at 672. Thus, “[w]e need not decide whether [the] defendant [has] sufficiently established knowing or reckless falsehoods [when the] defendant has failed to demonstrate that any false statements were material.” *Rashidi*, 172 N.C. App. at 634, 617 S.E.2d at 73; *see also United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008) (“[I]n order . . . to be entitled to a *Franks* hearing on [a] challenge of [an officer’s] affidavit, [a defendant] is required to make a substantial preliminary showing that [the officer] omitted material facts that when included defeat a probable cause showing . . .”).

Defendant argues that the evidence presented at the suppression hearing shows that Detective Colvard knowingly omitted material facts in his affidavit which were crucial to the finding of probable cause. Detective Colvard’s affidavit states in pertinent part:

On January 16th, 2007, the Ashe County Sheriff’s Office received a report of a breaking and entering and larceny at the New River Outfitter’s in the Crumpler area of Ashe County. Several items were taken in this break-in. On Friday January 19th, 2007, Lieutenant Detective Colvard located a registration card and business card bearing the name of Gene Wayne Haymond with an address of 515 Corporation St. Wilkesboro, NC 28697. . . . Lt. Colvard visited 515 Corporation St. Wilkesboro, NC and observed a coastal stainless steel grill on the side porch. Lt. Colvard noticed that this grill matched the description of a grill stolen on December 23, 2006, from another location in Ashe County. Lt. Colvard contacted the victim who also came to 515 Corporation St. and identified the grill as being his. The victim was certain of this because of a black bungee cord that he had applied to the grill.

Defendant argues Detective Colvard’s testimony at the suppression hearing materially contradicts the statements contained in his Probable Cause Affidavit. Defendant directs us to Detective Colvard’s testimony that the break-in at New River Outfitters occurred in late December 2006, rather than in January 2007 as suggested in the affidavit and nearer the time when Detective Colvard discovered the defendant’s registration card and business card in the course of his

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

investigation. Citing *State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980), defendant argues that omitting information showing that the breaking or entering could have occurred more than a month prior to the discovery of the cards materially reduces the likelihood that the stolen goods would be found at defendant's home. Defendant's contention is misplaced. The fact remains that the defendant's cards were discovered while Detective Colvard was still processing the scene for fingerprints, giving rise to a reasonable probability of defendant's presence there and that evidence relating to the crimes could be found at his residence. Probable cause requires a showing of "only the probability . . . of criminal activity." *State v. May*, 41 N.C. App. 370, 374, 255 S.E.2d 303, 306 (1979).

Likewise, defendant contends Detective Colvard's affidavit in support of the application for a search warrant omitted the fact, disclosed in his testimony, that the officer and Mr. Miller, whose grill was stolen in another December 2006 break-in, walked across defendant's yard, a possible violation of defendant's Fourth Amendment rights, to look at the grill before Mr. Miller was able to identify it. Again, we do not believe the omission is material; the porch where the grill was located was on the front portion of the house and was visible from the road, as was the grill. From that distance, Mr. Miller was "80 percent sure" the grill was his. Detective Colvard then accompanied Mr. Miller to defendant's house, where they pulled into the driveway, got out of the car, and walked through the yard to a point closer to the grill. From a closer vantage point, Mr. Miller was able to positively identify the grill as his based on the presence of the black bungee cord. When Mr. Miller and Detective Colvard walked through the yard, they merely looked at the grill and left. In doing so, neither Detective Colvard nor Mr. Miller violated defendant's Fourth Amendment rights. See *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599-600 (1979) ("Entrance [by a police officer] onto private property for the purpose of a general inquiry or interview is proper."), *appeal dismissed and disc. review denied*, 299 N.C. 124, 261 S.E.2d 925, *cert. denied*, 447 U.S. 906, 64 L. Ed. 2d 855 (1980); see also *United States v. Knight*, 451 F.2d 275, 278 (5th Cir. 1971) (finding that, even if the officer's entry onto private property was a trespass, the act of looking at an item in plain view was not an illegal search), *cert. denied by Grubbs v. United States*, 405 U.S. 965, 31 L. Ed. 2d 240 (1972). Accordingly, even considering the alleged omissions, we conclude the affidavit was sufficient to establish probable cause to believe the stolen items listed would be found in defendant's home.

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

[2] Defendant also argues that the trial court erred in denying his motion to suppress some of the items obtained during the search of his house because they were neither listed on the search warrant nor covered under the plain view doctrine. Specifically, defendant argues that it was not immediately apparent that these items were stolen. After a careful review of the record, we find defendant's argument has no merit.

We first note that defendant argues in his brief that "certain items" taken from defendant's home are inadmissible under the plain view doctrine. Yet, nowhere in his brief does defendant specifically state which of the items he challenges. However, after a review of defendant's assignments of error relating to this argument and the transcript references defendant has provided in his brief, it appears that defendant is objecting to the admission of a Toshiba television and Dewalt skill saw taken from Mr. Pelon's residence; assorted Carhartt clothing taken from Lowe Fur and Herb, Inc.; a microwave, refrigerator, dishwasher, and vanity taken from Mr. Ritch's residence; and a Jen-Air stove taken from Ms. Gambill's residence.

Under the plain view doctrine,

police may seize contraband or evidence if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband.

State v. Graves, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999). An item is "immediately apparent" under the plain view doctrine "if the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 389-90 (1993) (internal quotation marks omitted). Probable cause is present when "the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (alterations in original) (internal quotation marks omitted).

With regard to the Toshiba television and Dewalt saw, defendant appears to argue that the officers did not know these items were stolen until they were moved and the serial numbers were checked. In admitting the Dewalt saw, the trial court found

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

that upon the officers' entry and based on their prior investigations and knowledge they determined that other items appeared to be stolen from other break-ins, that subsequently as a result of the service of the search warrant on defendant . . . that the owner, the actual owner of the premises, Dawn Matthews, appeared and indicated to the officers . . . that she wanted any items that were stolen to be removed from the premises. And based on that officer's interpretation which the Courts find reasonable allowed them to begin to further search and open up items to determine whether or not they were stolen . . . and as a result the tools that were recovered in the Pelon case will be admissible.

The trial court made a similar finding in admitting the Toshiba television. After a review of the record, it appears that the detectives did not start opening the tool boxes until after Ms. Matthews had told them "that she wanted all the stolen property out of the house and that if it was even questionable she wanted it out." Moreover, there is evidence in the record that the officers did not begin to inventory anything until after they had talked to Ms. Matthews. These facts provide competent evidence to support the trial court's finding that Ms. Matthews gave the officers consent to further search the items to determine if they were stolen. *See State v. McLeod*, — N.C. App. —, —, 682 S.E.2d 396, 399 (2009) (finding consent to search a residence may be determined from the words and actions of a co-habitant of that residence even if the other co-habitant has not consented). Since Ms. Matthews consented to the further search, the trial court's conclusion to admit these items was proper. *See State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985) ("Evidence seized during a warrantless search is admissible if the State proves that the defendant . . . consented to the search.").

We also conclude the microwave, refrigerator, dishwasher, and vanity stolen from Mr. Ritch's residence were properly admitted into evidence. In *State v. Weakley*, 176 N.C. App. 642, 627 S.E.2d 315 (2006), this Court held it was immediately apparent that a shower curtain found in the defendant's home was evidence of a crime when the officer testified the curtain matched pictures she had seen that the "victims ha[d] provided [her] of items that were taken from their bathroom." *Weakley*, 176 N.C. App. at 649-50, 627 S.E.2d at 320. Similarly, in the present case, Detective Jason Whitley ("Detective Whitley") of the Wilkes County Sheriff's Department testified that when he entered the kitchen, he immediately recognized the appliances as being items stolen from a break-in he was investigating. He

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

was certain of this because he had pictures of the items and had a “good recollection” of what the stolen items looked like. The microwave had additional physical characteristics that further indicated to Detective Whitley that it was stolen. Accordingly, the trial court properly concluded that these items were in plain view and thus admissible.

The Jen-Air stove stolen from Ms. Gambill’s residence was also properly admitted. The evidence reveals that, upon entering defendant’s residence, Detective Whitley noticed that the stove was unusual in that it did not vent into the ceiling but had a down vent. He testified that it was a unique model and stood out because the sides were missing when it appeared there should be something there. At this time, he only took a picture of the stove. There is no evidence that the stove was moved in order to take the picture. Therefore, this was not an impermissible search or seizure. *Arizona v. Hicks*, 480 U.S. 321, 324-25, 94 L. Ed. 2d 347, 353-54 (1987) (stating that “mere recording of the serial numbers did not constitute a seizure” and “[m]erely inspecting those parts of the [object] that came into view during the [original] search would not have constituted an independent search”). Detective Whitley later showed the picture to Ms. Gambill, who identified it as her stove. After receiving consent from defendant, Detective Whitley went back to defendant’s home and seized the stove. In fact, defendant had the stove unhooked and ready for Detective Whitley to take when he arrived.

Finally, the trial court granted defendant’s motion to suppress a quantity of Carhartt clothing that was found when the officers opened drawers, because it was not in plain view. However, the officers also discovered a quantity of the Carhartt clothing in the basement, plainly visible to anyone entering the area. Detective Carson testified that when he saw it he remembered “that Carhartt clothing had been stolen from Lowe Fur & Herb.” From the tags attached to this Carhartt clothing, Detective David Johnson (“Detective Johnson”) from the North Wilkesboro Police Department was able to determine that it was the clothing taken from Lowe Fur and Herb, Inc. Detective Johnson’s observations gave him probable cause to believe that the clothing was stolen. The trial court did not err in determining that this clothing was admissible.

II.

[3] Citing *State v. Autry*, 321 N.C. 392, 364 S.E.2d 341 (1988), defendant argues the trial court impermissibly chilled his right to testify in

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

his own defense when it told him that statements made at the 7 January 2008 hearing could be used against him if he testified. In *Autry*, our Supreme Court found the trial court had incorrectly informed defendant when it said, “[The prosecutor] could, on good faith, ask you about prior misconduct, whether it resulted in convictions in court if they had some good faith reason to ask those questions, and you would be under oath to answer the questions truthfully.” *Autry*, 321 N.C. at 402, 364 S.E.2d at 347. However, the Court held this error was harmless because the evidence overwhelmingly proved defendant’s guilt and because the trial court repeatedly advised the defendant to consult his attorney before deciding whether to testify. *Id.* at 403-04, 364 S.E.2d at 348.

Defendant first suggests that the statements made at his hearing were inadmissible against him because they were made during a suppression hearing. It is true “that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.” *State v. Bracey*, 303 N.C. 112, 120, 277 S.E.2d 390, 395 (1981) (quoting *Simmons v. United States*, 390 U.S. 377, 394, 19 L. Ed. 2d 1247, 1259 (1968)). However, the 7 January 2008 hearing was not one on a motion to suppress evidence, and the statements were made after defendant, though represented by counsel, asked to address the court. Prior to granting the request, the trial court warned the defendant that his statements could be used against him. Even if the statements had been made in the course of a motion to suppress evidence, use of the statements for impeachment purposes “is permissible under the holding in *Simmons*.” *Id.* at 120, 277 S.E.2d at 396. The trial court expressly limited the use of these statements against defendant for impeachment purposes.

Defendant next contends the statements are inadmissible because they were made during the course of plea negotiations. Rule 410 of the North Carolina Rules of Evidence provides that “[a]ny statement made [by a defendant] in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn” is inadmissible at trial. N.C. Gen. Stat. § 8C-1, Rule 410(4) (2009); *see also* N.C. Gen. Stat. § 15A-1025 (2009) (“The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant . . .”). “Plea bargaining implies an offer to

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

plead guilty upon condition.” *United States v. Porter*, 821 F.2d 968, 976-77 (4th Cir. 1987) (internal quotation marks omitted), *cert. denied*, 485 U.S. 934, 99 L. Ed. 2d 269, *reh’g denied*, 485 U.S. 1042, 99 L. Ed. 2d 919 (1988). Moreover, as the rule implies, “[p]lea negotiations, in order to be inadmissible, must be made in negotiations with a *government attorney* or with that *attorney’s express authority*.” *Id.* at 977 (emphasis added). “In addition, conversations with government agents do not constitute plea discussions unless the defendant exhibits a subjective belief that he is negotiating a plea, and that belief is reasonable under the circumstances.” *State v. Curry*, 153 N.C. App. 260, 263, 569 S.E.2d 691, 694 (2002) (internal quotation marks omitted). Here, defendant’s statements at the 7 January 2008 hearing appear to have been made in an attempt to ask for either a continuance or the trial court’s mercy in imposing a lesser sentence than that offered by the prosecutor. Defendant was clearly aware that the prosecuting attorney was unwilling to accept defendant’s plea in exchange for the sentence which defendant requested, and defendant, therefore, made his request of the court:

I’m asking for mercy from the Court. Whether or not I deserve it, I’m not sure. When you look at my record or you look at these charges or the amount of money that Mr. Horner claims is at issue, I’m not sure that when you ask for mercy those things are—if—I don’t expect any mercy from Mr. Horner. I’m asking for it from the Court.

In response to this request, the trial court indicated that it was not willing to impose any sentence less than what the prosecuting attorney had already offered. After having time to further consider the State’s offer, defendant then decided to go to trial. From this evidence, it does not appear that defendant subjectively thought that he was negotiating a plea with the prosecuting attorney or with the prosecutor’s express authority when he made statements at the 7 January 2008 hearing. Instead, the statements were made in the course of defendant’s various requests to the trial court. Thus, defendant’s argument that these statements were made during the course of plea negotiations, and thus inadmissible, fails.

Finally, defendant argues that the trial court incorrectly concluded that defendant’s statements at the 7 January 2008 hearing were confessions. Thus, he contends that the trial court incorrectly informed him that the prosecutor could use the statements against him at trial. Under the North Carolina Rules of Evidence, an admission by a party opponent can be admitted against that party if it is “his

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

own statement, in either his individual or a representative capacity.” N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) (2009). “An admission is a statement of pertinent facts which, in light of other evidence, is incriminating.” *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 879-80 (1986). A confession is “an acknowledgment in express words by the accused in a criminal case of his guilt of the crime charged or of some essential part of it.” *State v. Fox*, 277 N.C. 1, 25, 175 S.E.2d 561, 576 (1970). “A confession, therefore, is a type of an admission.” *Trexler*, 316 N.C. at 531, 342 S.E.2d at 880. Accordingly, a statement is admissible against a party even if it is not technically a confession but qualifies as an admission.

At the 7 January 2008 hearing, defendant made various statements which implied his guilt of the charged offenses. At one point he said, “But in one case in Yadkin County they claimed \$30,000 worth of blankets were stole, and there is no way. At the high side, it might have been \$10,000 worth of blankets that were stole, and I admitted to that.” These statements clearly qualify as “statement[s] of pertinent facts which, in light of other evidence, [are] incriminating.” *Id.* at 531, 342 S.E.2d at 879-80. Accordingly, the trial court did not err when it ruled that these statements could be used against defendant for impeachment purposes or when it instructed defendant that the statements could be used against him at trial. Since the trial court did not err in advising defendant regarding the prosecutor’s potential use of his statements made at the 7 January 2008 hearing, defendant’s right to testify was not impermissibly chilled.

III.

[4] Defendant next challenges the trial court’s denial of his motion to dismiss the breaking or entering charges. Specifically, defendant contends the State failed to provide sufficient evidence that he broke or entered into any of the buildings alleged in the bills of indictment. Upon a motion to dismiss, “the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). “‘Substantial evidence’ is relevant evidence that a reasonable person might accept as adequate.” *Id.* In determining whether there is substantial evidence, a “reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.” *Id.* at 412-13, 597 S.E.2d at 746.

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

When the trial court does not instruct the jury “that it could convict [the] defendant if it found that he acted in concert with others in the commission of the elements of each of the offenses, the State ha[s] to satisfy the jury that [the] defendant personally committed every element of each offense.” *State v. Smith*, 65 N.C. App. 770, 772, 310 S.E.2d 115, 116-17, *aff’d as modified*, 311 N.C. 145, 316 S.E.2d 75 (1984). “To support a conviction for felonious breaking and entering under G.S. § 14-54(a), there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein.” *State v. Walton*, 90 N.C. App. 532, 533, 369 S.E.2d 101, 103 (1988). A breaking has been defined as “any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress.” *State v. Myrick*, 306 N.C. 110, 114, 291 S.E.2d 577, 580 (1982) (internal quotation marks omitted). The element of an entry is satisfied if a person inserts “any part of the body, hand, . . . foot, or . . . any instrument or weapon” into a building. *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 756 (2008) (internal quotation marks omitted).

In the present case, defendant was charged with the felonious breaking or entering of Mr. Ritch’s residence, Mr. Pelon’s residence, Ms. Gambill’s residence, and the business of Lowe Fur and Herb, Inc. The trial court did not instruct the jury as to the doctrine of acting in concert, thus, the State was required to prove that defendant committed the offenses himself. The State concedes there was insufficient evidence presented at trial from which the jury could find that defendant either broke or entered into Mr. Pelon’s residence, Mr. Ritch’s residence, or Lowe Fur and Herb, Inc. Defendant’s motions to dismiss those charges should have been granted, and we reverse his convictions of breaking or entering in 07 CRS 881, 07 CRS 886, and 07 CRS 50466.

With respect to the charge of breaking or entering into Ms. Gambill’s residence, however, we reach a different conclusion. “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances.” *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993) (citation and internal quotation marks omitted). If there is a reasonable inference, then the question of defendant’s guilt is left to the jury. *Id.* The evidence surrounding the breaking or entering of Ms. Gambill’s residence tended

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

to show that defendant and Daniel Ritcher went to Ms. Gambill's house together to "take the stuff [they] wanted to take." Ritcher gained entry into Ms. Gambill's house "through the window or the back door." It did not take long to load the items, which included a Jen-Air stove, a riding lawnmower, and a ladder. Based on the nature and size of the items taken, the evidence presented creates a reasonable inference that defendant entered Ms. Gambill's home to assist Ritcher in removing the property from the house quickly. Thus, the trial court did not err in denying defendant's motion to dismiss this breaking or entering charge.

IV.

[5] Finally, defendant argues that the trial court impermissibly sentenced him, at least in part, because of his insistence on having his cases tried by a jury. He thus contends that he is entitled to a new sentencing hearing.

"A sentence within statutory limits is presumed to be regular." *State v. Peterson*, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002) (internal quotation marks omitted), *appeal after remand*, 168 N.C. App. 597, 608 S.E.2d 417 (2005). However,

[w]here it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result.

State v. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). At a pre-trial hearing on 7 January 2008, defendant asked the trial court to consider a possible sentence of five years of imprisonment and five years of probation in response to an offer by the prosecutor to recommend a sentence of ten years. In response to this request, the trial court responded by saying, "So I'm just telling you up front that the offer the State made is probably the best thing." Defendant declined the State's offer.

At a subsequent pre-trial hearing on defendant's motion to suppress evidence, the subject of a plea arrangement was again discussed, and the trial court reminded defendant of the earlier discussions as well as the possible sentences which could be imposed if defendant were convicted of the offenses as an habitual felon. Defendant indicated that he understood the exposure, but declined the prosecutor's plea offer.

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

After defendant was found guilty of the offenses, and after hearing arguments by the State and defendant on the issue of mitigating factors, the trial court stated, “[w]ay back when we dealt with that plea different times and, you know, you told me you didn’t have any drugs problems, you didn’t have anything, what you wanted to do, and I told you that the best offer you’re gonna get was that ten-year thing, you know.” Defendant contends that, by that statement, an inference arises that the trial court based its sentence at least in part on defendant’s failure to accept the State’s plea offer. We agree.

In *State v. Hueto*, — N.C. App. —, —, 671 S.E.2d 62 (2009), the trial court told the defendant prior to trial:

[If you go to trial,] you are putting your faith in the hands of twelve strangers who do not know you, who do not know your situation, and if they find you guilty of the charges against both of these young girls, it will compel me to give you more than a single B-1 sentence, and I would have to give you at least two . . . and maybe more.

— N.C. App. at —, 671 S.E.2d at 67. After a jury trial, the defendant was convicted of two counts of first-degree rape and six counts of statutory rape. *Id.* at —, 671 S.E.2d at 64. Before sentencing defendant to eight consecutive sentences, the trial court stated

To you, Senior Hueto, I regret that you do [sic] not choose to take the offer that had been made to you at the beginning of the trial to plead guilty for a lesser sentence. And I had told you that I did not know what I would . . . give in terms of a sentence but that I would await the jury’s verdict.

Id. at —, 671 S.E.2d at 68. This Court found that, since the trial court had the discretion to consolidate defendant’s convictions for the purpose of judgment, it could reasonably be inferred from these statements that the trial court’s “decision to impose eight consecutive sentences was partially based on [the] Defendant’s decision to plead not guilty.” *Id.* at —, 671 S.E.2d at 69.

Defendant was convicted of having committed the offenses after having attained the status of an habitual felon. N.C.G.S. § 14-7.6 mandates that when “an habitual felon . . . commits any felony under the laws of the State of North Carolina, the felon must, upon conviction . . . be sentenced as a Class C felon.” N.C. Gen. Stat. § 14-7.6 (2009). “Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section.” *Id.* “However,

STATE v. HAYMOND

[203 N.C. App. 151 (2010)]

in situations where a defendant is convicted of two or more offenses, the General Assembly has given the trial court discretion to consolidate the offenses into a single judgment.” *State v. Tucker*, 357 N.C. 633, 636, 588 S.E.2d 853, 855 (2003); *see also* N.C. Gen. Stat. § 15A-1340.15(b) (2009) (“If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses.”). Since N.C.G.S. § 14-7.6 does not expressly preclude the trial judge from exercising its statutory discretion under N.C.G.S. § 15A-1340.15(b), we see no reason to so hold. *See Bd. of Adjustment of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (“Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each.”), *reh’g denied*, 335 N.C. 182, 436 S.E.2d 369 (1993); *see also* *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 595, 528 S.E.2d 568, 571 (2000) (construing Rule 9(j) and Rule 41(a)(1) of the North Carolina Rules of Civil Procedure as compatible where Rule 9(j) did “not expressly preclude such complainant’s right to utilize a Rule 41(a)(1) voluntary dismissal”). Thus, the trial court in the present case had the discretion to consolidate some or all of defendant’s convictions for the purposes of judgment.

However, without consolidating any of defendant’s convictions, the trial court sentenced defendant in the presumptive range as a Class C felon to ten felonies and made the sentences run consecutively. Thus, as in *Hueto*, we believe it may be reasonably inferred from the trial court’s statements that it made this decision based at least in part on defendant’s decision to refuse the State’s plea offer. *See State v. Pavone*, 104 N.C. App. 442, 446, 410 S.E.2d 1, 3 (1991) (finding that the trial court’s statement at sentencing that, “[y]ou tried the case out; this is the result” created a reasonable inference that the trial court impermissibly considered the defendant’s failure to accept a plea in imposing its sentence). Accordingly, defendant is entitled to a new sentencing hearing.

07 CRS 000881—Reversed.

07 CRS 000886—Reversed.

07 CRS 050460—No Error At Trial; New Sentencing Hearing.

07 CRS 050466—Reversed.

08 CRS 000108—No Error At Trial; New Sentencing Hearing.

08 CRS 001470—No Error At Trial; New Sentencing Hearing.

STATE v. HINSON

[203 N.C. App. 172 (2010)]

08 CRS 001471—No Error At Trial; New Sentencing Hearing.

08 CRS 001472—No Error At Trial; New Sentencing Hearing.

08 CRS 001473—No Error At Trial; New Sentencing Hearing.

08 CRS 001474—No Error At Trial; New Sentencing Hearing.

08 CRS 001475—No Error At Trial; New Sentencing Hearing.

Judges HUNTER and ERVIN concur.

STATE OF NORTH CAROLINA v. CHARLES RALPH HINSON

No. COA09-748

(Filed 6 April 2010)

1. Search and Seizure— motion to suppress evidence—methamphetamine lab—precursor chemicals

The trial court did not err in a manufacturing methamphetamine and possession of precursor chemicals case by denying defendant's motion to suppress evidence found during the search of his house. The sworn information was competent evidence to support a finding that the equipment and materials observed by an informant were of the type that would be present in a methamphetamine lab that was an ongoing operation that was long term in nature.

2. Search and Seizure— issuance of warrant—probable cause—staleness of evidence

The trial court did not err in a manufacturing methamphetamine and possession of precursor chemicals case by determining that probable cause existed to support the issuance of a search warrant. The magistrate considered not only the three-week old evidence given by an informant, but also observations made just one day before the warrant application was submitted, as well as a lieutenant's opinion based on his experience that an ongoing methamphetamine production operation was present.

3. Search and Seizure— issuance of warrant—probable cause—totality of circumstances

The trial court did not err in a manufacturing methamphetamine and possession of precursor chemicals case by denying defendant's motion to suppress the evidence obtained by the

STATE v. HINSON

[203 N.C. App. 172 (2010)]

execution of a search warrant. Based on the totality of circumstances and giving great deference to the magistrate's determination, there was sufficient evidence to support a conclusion of probable cause.

4. Drugs— manufacturing methamphetamine—motion to dismiss—intent to distribute not necessary element of offense

The trial court did not err by denying defendant's motion to dismiss the charge of manufacturing methamphetamine. Defendant was not required to prove the additional element of intent to distribute since he was not charged with either preparation or compounding a controlled substance.

5. Drugs— requested instruction—personal use exception

The trial court did not err by failing to give a requested instruction on excluding preparation for one's own use from manufacturing methamphetamine. The personal use exception was inapplicable to defendant's charge.

6. Indictment and Information— variance—plain error

The trial court committed plain error by instructing the jury that they could find defendant guilty of manufacturing methamphetamine under theories of guilt that were in variance from the indictment. Defendant was granted a new trial on 06 CRS 1602 for manufacture of a controlled substance.

7. Drugs— possessing precursor chemicals—instruction—actual possession

The trial court did not err by instructing the jury that they could find defendant guilty of possessing precursor chemicals under the theory of actual possession. Defendant failed to show how the instruction would have misled the jury or that any potential error may have prejudiced defendant. However, the conviction under 06 CRS 1602 for possession of precursor chemicals was remanded for resentencing since it was consolidated for judgment with the conviction under 06 CRS 1603 that was already remanded.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 17 October 2008 by Judge James W. Morgan in Superior Court, Cleveland County. Heard in the Court of Appeals 2 December 2009.

STATE v. HINSON

[203 N.C. App. 172 (2010)]

Attorney General Roy Cooper, by Assistant Attorney General John P. Scherer II, for the State.

Teddy, Meekins, & Talbert, P.L.L.C., by Anne Bleyman, for Defendant-Appellant.

McGEE, Judge.

Charles Ralph Hinson (Defendant) was indicted on 13 March 2006 in two separate indictments charging him with manufacturing methamphetamine and possession of precursor chemicals. Defendant was convicted by a jury as charged on 17 October 2008. The trial court consolidated the judgments and Defendant was sentenced to a term of 88 to 115 months in prison. Defendant appeals.

Evidence was presented at a suppression hearing and at trial. The evidence presented tended to show that Defendant and his wife, Pam Hinson, lived at 334 Carpenter's Grove Church Road, Lawndale, located in Cleveland County. Relying on information provided by an informant to Sergeant Tim Johnson of the Lincoln County Sheriff's Office, agents of the State Bureau of Investigation and officers of the Cleveland County Sheriff's Office obtained a warrant to search Defendant's house on 2 March 2006. The warrant was served on 3 March 2006.

Agent Ann Hamlin, a drug chemist with the State Bureau of Investigation, and Sergeant Chris Hutchins of the Cleveland County Sheriff's Office, entered Defendant's house on 3 March 2006 and participated in the search. Agent Hamlin found items in Defendant's house that she felt were consistent with the manufacture of controlled substances. She found powder inside folded filter paper, which she opined to be pseudoephedrine. Agent Hamlin found inside another filter paper a substance that she believed to be methamphetamine and pseudoephedrine. Agent Hamlin also found a gallon-sized milk jug that contained "a two layer liquid" that, after testing, Agent Hamlin testified was methamphetamine and pseudoephedrine. Agent Hamlin testified that testing revealed iodine and red phosphorous in other samples of the folded filter papers. Agent Hamlin further testified that the materials discovered at Defendant's house could be used to manufacture methamphetamine, and it was her opinion that there was a "clandestine methamphetamine laboratory" located at the house.

As a result of the search of Defendant's house, Defendant was charged with manufacturing methamphetamine and possession of

STATE v. HINSON

[203 N.C. App. 172 (2010)]

precursor chemicals. Defendant moved to suppress the evidence obtained during the search of his home on the grounds that the search warrant was obtained illegally. Following the suppression hearing, Defendant's motion was denied and trial proceeded. Defendant was found guilty of manufacturing methamphetamine and possession of precursor chemicals.

Motion to Suppress

[1] Defendant first argues that the trial court erred by denying his motion to suppress the evidence found during the search of his house. Defendant asserts that the warrant was not supported by probable cause and was therefore defective. We disagree.

Our Court reviews a ruling on a motion to suppress to determine “whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “Where, however, the trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). We review a trial court’s conclusions of law *de novo*. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

In the trial court’s order denying Defendant’s motion to suppress, the trial court made findings of fact and conclusions of law, including *inter alia*, the following:

5. That on or about February 24th, 2006, [Informant] was arrested for forgery/counterfeiting in Lincoln County, North Carolina, on an arrest warrant obtained by Sgt. Tim Johnson of the Lincoln County Sheriff’s Department.
6. At the time of said arrest, Sgt. Johnson told [Informant] that federal authorities [might] step into the investigation of his case. He further informed [Informant] that the only way to help himself with Johnson or with the federal authorities was to provide substantial assistance.
7. Sgt. Johnson had known [Informant] since approximately 1981 when [Informant] was in a youth group led by Johnson. Johnson knew of prior arrests [Informant] had for drugs, obtaining property by false pretenses and other charges.

STATE v. HINSON

[203 N.C. App. 172 (2010)]

Johnson also knew that [Informant] had provided information to law enforcement in the past to try to help himself with the charges. The information provided by [Informant] in the past had led to arrests.

...

9. [Informant] told Johnson that he knew of methamphetamine dealers in Cleveland and Burke Counties. He provided the names and address of [Defendant] and his wife in Cleveland County.
10. [Informant] had provided information in at least three other cases in Lincoln County that led to arrest[s] on charges involving checks and drugs. The information provided by [Informant] had turned out to be reliable and that while [Informant] himself had been involved in fraudulent activity, information he has provided to law enforcement in efforts toward substantial assistance has been reliable. Sgt. Johnson believed [Informant] to be a reliable confidential information [sic].
11. On or about March 1, 2006, [Informant] told Johnson he had been at the home of [Defendant] on February 28th, 2006, had gone into [D]efendant's kitchen and had seen pills and matches on the counter. Some of the matches had been cut up and placed in a Ziploc bag. The door to the "cooking room" was closed. Defendant and his wife were outside the home but on the premises.
12. [Informant] told Sgt. Johnson further: that he had known [D]efendant and his wife for several years; . . . that there was a vent in the outside wall of the "cooling [sic] room"; that if the vent was uncovered that methamphetamine was being cooked; that he had been ad [sic] Defendant's house three weeks to a month prior and that they had been cooking methamphetamine at that time; that Defendant had down-loaded recipes for cooking methamphetamine into his computer; that Defendant and his wife would cook anywhere from a gram to an ounce of methamphetamine at a time; and that in the cooking room was a burner, hot plate, exhaust fan, chemicals, mason jars, glassware, matches, pills, acetone, muriatic and sulfuric acids, and butane.

...

STATE v. HINSON

[203 N.C. App. 172 (2010)]

18. . . . Lt. Shores [of the Cleveland County Sheriff's Office] prepared an application for a search warrant that was presented to the undersigned at approximately 6:15 p.m. on March 2nd, 2006. Said application did not contain information regarding the nature of [Informant's] prior criminal activity but related how he had provided information in the past that had led to the arrest of three individuals and that Sgt. Johnson was of the opinion that if [Informant] told him something, it would be the truth.
19. The information provided by [Informant] in the context by which it was provided had been reliable in the past. Such information had led to the arrest of three individuals. That this information was sufficient to satisfy the undersigned that the information provided to law enforcement was reliable for the issuance of the search warrant. [Informant's] fraudulent activity in his personal life is inconsequential to the undersigned in regards to whether to issue a warrant and that confidential informants often do have criminal histories and pending criminal charges at the time they provide information.
20. When Sgt. Johnson told [Informant] that the only way he could help himself was to provide substantial assistance, he did not tell or suggest to [Informant] what type of assistance to provide. Sgt. Johnson did not provide [Informant] with names upon whom to offer information. Sgt. Johnson did not tell [Informant] what type of information to provide. Sgt. Johnson did not tell [Informant] how to obtain the information.
21. [Informant] was well familiar with . . . [D]efendant and his wife. He had been to their house a number of times. He had known them a number of years. He knew where in the house [D]efendant and his wife cooked methamphetamine. He knew where [D]efendant kept his gun. [Informant] had been in [D]efendant's house three weeks to one month prior to February 28th, 2006, while [D]efendant cooked methamphetamine.
22. On February 28th, 2006, [Informant] went to [D]efendant's house. Defendant and his wife were outside of the home working on a backhoe. [Informant] stepped through the outside door of the residence into the kitchen area, saw pills and matches on the counter and left. He did not enter any other

STATE v. HINSON

[203 N.C. App. 172 (2010)]

area of the house. No evidence was presented other than suggestion that [Informant] had been told to not be on or about [D]efendant's property or was told not to enter [D]efendant's home. [Informant's] familiarity with [D]efendant and his wife and the regularity of his visits leads to the conclusion [Informant's] entry into [D]efendant's home was not illegal.

23. Lt. Shores has had extensive training and experience with narcotics investigations and clandestine laboratories. Based upon his training and experience, the location of the pills, matches and the preparation of the matches led Lt. Shores to the opinion a methamphetamine lab was in operation or about to be operated.
24. Coupling the items seen by [Informant] on February 28th, 2006, with the equipment and materials observed three weeks to one month previous add credence to Lt. Shores' opinion concerning the operation of the methamphetamine lab.
25. The equipment and materials observed by [Informant] prior to February 28th, 2006, were of the type that a methamphetamine lab operation was an ongoing operation, long term in nature. This information was sufficient to establish probable cause for the issuance of the search warrant.
26. The totality of the circumstances described in the application for the search warrant created a substantial basis for more than a fair probability that methamphetamine lab equipment and contraband would be found at [D]efendant's house.

Based on the foregoing findings, the [c]ourt CONCLUDES:

1. [Informant] was not acting as an agent of the State when he entered [D]efendant's property.
2. [Informant's] criminal record and charges were of little or no consequence when taken in the context of providing prior reliable information that led to arrest[s].
3. The information contained in the application for search warrant was sufficient to provide probable cause for the issuance of the search warrant.
4. There was no violation of [D]efendant's statutory or Constitutional rights in the issuance of the search warrant on March 2nd, 2006.

STATE v. HINSON

[203 N.C. App. 172 (2010)]

Defendant challenges the trial court's finding of fact number 25: "The equipment and materials observed by [Informant] prior to February 28th, 2006, were of the type that a methamphetamine lab operation was an ongoing operation, long term in nature." Defendant first contends that this finding is actually a conclusion of law, not a finding of fact, and we should, therefore, review this "finding" *de novo*.

The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through "logical reasoning from the evidentiary facts" is more properly classified a finding of fact.

Matter of Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted).

Defendant asserts specifically that the clause, "a methamphetamine lab operation was an ongoing operation, long term in nature[.]" was a conclusion of law. However, Defendant does not provide any support for the notion that a determination that an operation was an ongoing operation and long term in nature reflected the exercise of judgment or the application of legal principles. Reviewing finding of fact number 25 in its entirety, we find that the phrase: "The equipment and materials observed by [Informant] prior to February 28th, 2006, were of the type that a methamphetamine lab operation was an ongoing operation, long term in nature[.]" more accurately reflects the application of "logical reasoning from the evidentiary facts[.]" Therefore, we hold that the portion of finding of fact number 25 to which Defendant directs his argument is properly labeled a finding of fact and we review it to determine whether it was supported by competent evidence.¹ *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

In his application for a search warrant, Lieutenant Joel Shores of the Cleveland County Sheriff's Office included the following statements under the heading, "Probable Cause":

1. We note that finding of fact number 25 also contains the following sentence: "This information was sufficient to establish probable cause for the issuance of the search warrant." This portion is a conclusion of law and not a finding of fact, but Defendant's argument is directed towards that portion of finding of fact number 25 which we have determined to be a finding of fact. See *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002) ("[A] trial court's conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*."). (Citations omitted, internal alteration in the original).

STATE v. HINSON

[203 N.C. App. 172 (2010)]

Based on my training and experience, I am familiar with the chemicals and Precursors associated with the manufacturing of methamphetamine and the traits and practices of those involved in the manufacturing of methamphetamine.

...

[I]nformant] stated . . . [t]hat within the last three weeks, he/she had seen [Defendant and his wife] cooking methamphetamine in the house.

...

[I]nformant stated that he/she had been to [Defendant's house] with[in] the last 72 hours of making this application and had saw [sic] pills and matches on the counter of the kitchen. . . . [I]nformant stated that some of the matches were in boxes, some w[ere] in packs and some w[ere] cut up and in a zip lock bag.

...

Based on this officer[']s training and experience, and the detailed information supplied by . . . [I]nformant who has given credible information in the past, This applicant believes that [Defendant and his wife] are in the business of manufacturing Methamphetamine[.]

We hold that this sworn information is competent evidence to support a finding that "[t]he equipment and materials observed by [Informant] prior to February 28th, 2006, were of the type that a methamphetamine lab operation was an ongoing operation, long term in nature."

The Trial Court's Conclusions of Law

[2] Defendant focuses his argument on the trial court's determination that there existed probable cause to support the issuance of a warrant. Defendant argues that the information provided by Lieutenant Shores in the warrant application was stale and, therefore, insufficient to support the issuance of a warrant.

Staleness

Our Court addressed the issue of "staleness" in *State v. Witherspoon* as follows:

[t]he test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. Common sense must be

STATE v. HINSON

[203 N.C. App. 172 (2010)]

used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock.

...

Our Supreme Court has stated that a number of variables are to be considered in determining whether probable cause still exists at the time a search warrant is issued, including *inter alia* the items to be seized and the character of the crime.

...

One may properly infer that equipment acquired to accomplish the crime and records of the criminal activity will be kept for some period of time. When the evidence sought is of an ongoing criminal business of a necessarily long-term nature, such as marijuana growing, rather than that of a completed act, greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time.

State v. Witherspoon, 110 N.C. App. 413, 419-20, 429 S.E.2d 783, 786-87 (1993) (internal citations omitted).

Defendant's argument focuses on the statements made by Informant to officers that Informant had been to Defendant's house three weeks earlier. Defendant contends that the materials observed by Informant three weeks prior to the issuance of the warrant were stale at the time the warrant application was submitted to the magistrate. By limiting his focus to one finding of fact, Defendant ignores the evidence concerning Informant's observations made just one day prior to the submission of the warrant application. When the trial court's order is considered in its entirety, Defendant's argument fails.

The trial court's findings of fact reprinted above were either unchallenged by Defendant, or have been reviewed by this Court, and deemed supported by competent evidence. They are therefore binding on appeal. *Roberson*, 163 N.C. App. at 132, 592 S.E.2d at 735-36. We find the following findings of fact particularly pertinent:

11. On or about March 1, 2006, [Informant] told Johnson he had been at the home of . . . [D]efendant on February 28th, 2006, had gone into [D]efendant's kitchen and had seen pills and matches on the counter. Some of the matches had been cut up and placed in a Ziploc bag. The door to the "cooking

STATE v. HINSON

[203 N.C. App. 172 (2010)]

room” was closed. Defendant and his wife were outside the home but on the premises.

12. [Informant] told Sgt. Johnson further: that he had known [D]efendant and his wife for several years; . . . that there was a vent in the outside wall of the “cooling [sic] room”; that if the vent was uncovered that methamphetamine was being cooked; that he had been ad [sic] Defendant’s house three weeks to a month prior and that they had been cooking methamphetamine at that time; that Defendant had downloaded recipes for cooking methamphetamine into his computer; that Defendant and his wife would cook anywhere from a gram to an ounce of methamphetamine at a time; and that in the cooking room was a burner, hot plate, exhaust fan, chemicals, mason jars, glassware, matches, pills, acetone, muriatic and sulfuric acids, and butane.

. . .

21. [Informant] was well familiar with [D]efendant and his wife. He had been to their house a number of times. He had known them a number of years. He knew where in the house [D]efendant and his wife cooked methamphetamine. He knew where [D]efendant kept his gun. [Informant] had been in [D]efendant’s house three weeks to one month prior to February 28th, 2006, while [D]efendant cooked methamphetamine.
22. On February 28th, 2006, [Informant] went to [D]efendant’s house. Defendant and his wife were outside of the home working on a backhoe. [Informant] stepped through the outside door of the residence into the kitchen area, saw pills and matches on the counter and left. He did not enter any other area of the house. No evidence was presented other than suggestion that [Informant] had been told to not be on or about [D]efendant’s property or was told not to enter [D]efendant’s home. [Informant’s] familiarity with [D]efendant and his wife and the regularity of his visits leads to the conclusion [Informant’s] entry into [D]efendant’s home was not illegal.
23. Lt. Shores has had extensive training and experience with narcotics investigations and clandestine laboratories. Based upon his training and experience, the location of the pills, matches and the preparation of the matches led Lt. Shores to

STATE v. HINSON

[203 N.C. App. 172 (2010)]

the opinion a methamphetamine lab was in operation or about to be operated.

24. Coupling the items seen by [Informant] on February 28th, 2006, with the equipment and materials observed three weeks to one month previous add credence to Lt. Shores' opinion concerning the operation of the methamphetamine lab.
25. The equipment and materials observed by [Informant] prior to February 28th, 2006, were of the type that a methamphetamine lab operation was an ongoing operation, long term in nature. This information was sufficient to establish probable cause for the issuance of the search warrant.

It is clear that the trial court determined that the magistrate considered not only the three-week old evidence, but also observations made just one day before the warrant application was submitted, as well as Lieutenant Shores' opinion that, based on his experience, an ongoing methamphetamine production operation was present. Based on both common sense and the nature of "the items to be seized and the character of the crime[.]" we find this evidence not to be stale. *Witherspoon*, 110 N.C. App. at 419, 429 S.E.2d at 786 (internal citations omitted).

Probable Cause

[3] We now review the trial court's findings of fact to determine whether they support the trial court's conclusions of law. In reviewing an application for a warrant, a reviewing court is to pay "great deference" to the magistrate's determination of probable cause. *State v. Ledbetter*, 120 N.C. App. 117, 121-22, 461 S.E.2d 341, 344 (1995) (citations omitted). A reviewing court "should not conduct a *de novo* review of the evidence to determine whether probable cause existed at the time the warrant was issued." *Id.* at 122, 461 S.E.2d at 344 (citations omitted). To determine whether probable cause existed, a reviewing court is to examine "the totality of the circumstances." *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 261 (1984).

We have explained the requirements for a finding of probable cause as follows:

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. The determination of the existence of probable cause is not concerned with the question of whether the accused is guilty or innocent, but only with whether

STATE v. HINSON

[203 N.C. App. 172 (2010)]

the affiant has reasonable grounds for his belief. If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent person would be led to believe there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant.

State v. Byrd, 60 N.C. App. 740, 743, 300 S.E.2d 16, 18 (1983) (citation omitted).

Reviewing the findings of fact as detailed above, in the totality of the circumstances and giving great deference to the magistrate's determination, we find sufficient evidence to support a conclusion of probable cause. In particular, we find that Informant's observations of methamphetamine production and materials, both three weeks-old and one day-old, combined with Lieutenant Shores' opinion that there was, in fact, such an operation, "are such that a reasonably discreet and prudent person would be led to believe there was a commission of the offense charged." *Id.* We therefore hold that the trial court did not err in denying Defendant's motion to suppress the evidence obtained by the execution of the search warrant.

Intent to Distribute a Controlled Substance

[4] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of manufacturing methamphetamine because there was insufficient evidence that Defendant intended to distribute the substance. We disagree.

When ruling on a motion to dismiss, a trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The trial court "is to consider the evidence in the light most favorable to the State . . . [and] the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982) (internal citations omitted).

The indictment stated that Defendant "manufacture[d] methamphetamine, a controlled substance included in [S]chedule II of the N.C. Controlled Substances Act. The manufacturing consisted of chemically combining and synthesizing precursor chemicals to create methamphetamine." Defendant argues that "[w]hen, as in the case

STATE v. HINSON

[203 N.C. App. 172 (2010)]

sub judice, the manufacturing activity is compounding, intent to distribute is then a necessary element of the offense of manufacturing.” Defendant’s statement of the law is correct, but his assertion that it applies to the case before us is not.

N.C. Gen. Stat. § 90-87(15) defines “manufacture” as:

the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and “manufacture” further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use[.]

N.C. Gen. Stat. § 90-87(15) (2010). Our Supreme Court has noted that proof of intent to distribute is required by portions of this statute but has held that “the offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding.” *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984). The purpose of the requirement of intent to distribute for preparation or compounding is to

avoid making an individual liable for the felony of manufacturing [a] controlled substance in the situation where, being already in possession of a controlled substance, he makes it ready for use (*i.e.*, rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (*i.e.*, making the so-called “Alice B. Toklas” brownies containing marijuana).

Id. at 567, 313 S.E.2d at 588, quoting *State v. Childers*, 41 N.C. App. 729, 732, 255 S.E.2d 654, 656 (1979) (alterations in the original).

Defendant was charged with manufacturing methamphetamine by “chemically combining and synthesizing precursor chemicals[.]” We note that this language does not track the precise language of N.C.G.S. § 90-87(15), but we find that it is most similar to the following clause: “by means of chemical synthesis, or by a combination of extraction and chemical synthesis.” N.C.G.S. § 90-87(15). Defendant asserts that “in the case *sub judice*, the manufacturing activity is compounding[.]” We disagree. The indictment is clear that Defendant was charged with chemically synthesizing precursor chemicals to

STATE v. HINSON

[203 N.C. App. 172 (2010)]

create methamphetamine and not with either “the preparation or compounding of a controlled substance[.]” N.C.G.S. § 90-87(15).

The activity for which Defendant was charged was the creation of methamphetamine from the precursor chemicals pseudoephedrine and red phosphorous. This situation is clearly distinguishable from that discussed in *Brown*, where a defendant “*already in possession of a controlled substance . . . makes it ready for use (i.e., rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (i.e., making the so-called ‘Alice B. Toklas’ brownies containing marijuana).*” *Brown*, 310 N.C. at 567, 313 S.E.2d at 588, quoting *Childers*, 41 N.C. App. at 732, 255 S.E.2d at 656 (emphasis added). Because Defendant was not charged with either “preparation or compounding of a controlled substance[.]” the State was not required to prove the additional element of intent to distribute. *Id.*

Defendant’s only argument concerning his motion to dismiss the charge of manufacturing a controlled substance relies on the State’s failure to prove Defendant’s intent to distribute. Because we have determined that intent to distribute was not a necessary element of the offense charged, we overrule this assignment of error.

*Jury Instructions**Personal Use*

[5] Defendant next argues that the trial court erred by failing to give an instruction “on excluding preparation for one’s own use from manufacturing methamphetamine[.]” We disagree. “The trial court must give a requested instruction, at least in substance, if a defendant requests it and the instruction is correct in law and supported by the evidence.” *State v. Reynolds*, 160 N.C. App. 579, 581, 586 S.E.2d 798, 800 (2003). In this case, because we have determined that the personal use exception is inapplicable to Defendant’s charge, the trial court was not required to provide this instruction. We therefore overrule this assignment of error.

Variance in the Indictment and Instruction

[6] Defendant next argues that the trial court committed plain error “in instructing the jury they could find [Defendant] guilty of manufacturing methamphetamine under theories of guilt that were in variance from the indictment[.]” We agree.

Defendant did not object to the jury instructions and is therefore limited to assigning plain error to them. *State v. Hardy*, 353 N.C. 122,

STATE v. HINSON

[203 N.C. App. 172 (2010)]

131, 540 S.E.2d 334, 342 (2000). Plain error is an error so fundamental and so prejudicial that justice cannot have been done. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Defendant relies on *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986) and *State v. Turner*, 98 N.C. App. 442, 391 S.E.2d 524 (1990).

In *Tucker*, the indictment which led to the defendant's charges contained the following language:

"The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did kidnap [the victim], a person who had attained the age of 16 years, by unlawfully *removing her from one place to another*, without her consent, and for the purpose of facilitating the commission of the felonies of First Degree Rape and First Degree Sexual Offense. The victim . . . was sexually assaulted by the defendant."

Tucker, 317 N.C. at 537, 346 S.E.2d at 420 (alteration and emphasis in the original). The jury was instructed that "they could find defendant guilty of first degree kidnapping if they found, *inter alia*, 'that the defendant unlawfully *restrained* [the victim], that is, restricted [her] freedom of movement by force and threat of force.' (Emphasis supplied.)" *Id.* Our Supreme Court held that:

Although the state's evidence supported [the trial court's] instruction, the indictment does not. "It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." The kidnapping indictment charges that defendant committed kidnapping only by unlawfully *removing* the victim "from one place to another." [The trial court] repeatedly instructed the jury that defendant could be convicted if he simply unlawfully *restrained* the victim, "that is, restricted [her] freedom of movement by force and threat of force."

Id. at 537-38, 346 S.E.2d at 420-21 (citation omitted, emphasis in the original). The Supreme Court then determined that the trial court's instruction was error. *Id.* at 540, 346 S.E.2d at 422.

The Court in *Tucker*, in determining whether the trial court's error was plain error, quoted *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984):

STATE v. HINSON

[203 N.C. App. 172 (2010)]

In conclusion, the judge's instructions permitted the jury in this case to predicate guilt on theories of the crime which were not charged in the bill of indictment and which were, in one instance, not supported by the evidence at trial. We therefore hold that under the factual circumstances of this case, there was "plain error" in the jury instructions as that concept was defined in *Odom* and defendant must therefore receive a new trial on the first-degree kidnapping charge.

Brown, 312 N.C. at 249, 321 S.E.2d at 863. The *Tucker* Court then held that the trial court committed plain error:

It is true that in *Brown* one of the theories submitted was supported by neither the evidence nor the indictment. Nevertheless, it would be difficult to say that permitting a jury to convict a defendant on a theory not legally available to the state because it is not charged in the indictment or not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine. In light of the highly conflicting evidence in the instant kidnapping case on the unlawful removal and restraint issues, we think the instructional error might have, as we said in *Walker*, " 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." Defendant must, therefore, receive a new trial on the kidnapping charge for plain error in the jury instructions.

Tucker, 317 N.C. at 540, 346 S.E.2d at 422 (citations omitted).

In *Turner*, our Court addressed a similar issue. We held that, in spite of the fact that the evidence supported the jury instructions, the indictment did not:

In our case, defendant was indicted for "conspir[ing] with Ernie Lucas to commit the felony of trafficking to deliver to *Ernie Lucas* 28 grams or more . . . of cocaine." However, the trial court instructed the jury "that . . . the defendant agreed with Ernie Lucas to deliver 28 grams or more of cocaine to another, and that the defendant,—and that Ernie Lucas intended at the time the agreement was made, that the cocaine would be delivered. . . ." Just as in *Tucker*, we believe that the State's evidence does support the trial court's instruction; however, the indictment does not. Consequently, we must award defendant a new trial on the conspiracy charge.

Turner, 98 N.C. App. at 447-48, 391 S.E.2d at 527 (alterations and emphasis in the original).

STATE v. HINSON

[203 N.C. App. 172 (2010)]

In the present case, Defendant was indicted for “manufactur[ing] methamphetamine, a controlled substance included in [S]chedule II of the N.C. Controlled Substances Act. The manufacturing consisted of chemically combining and synthesizing precursor chemicals to create methamphetamine.” The jury was instructed as follows:

[Defendant] has been charged with manufacturing methamphetamine, a controlled substance. For you to find [Defendant] guilty of this—guilty of this offense, the State must prove beyond a reasonable doubt that [Defendant] manufactured methamphetamine. Producing, preparing, propagating, compounding, converting or processing methamphetamine, either by extraction from substances of natural origin or by chemical synthesis would be manufacturing methamphetamine.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the [Defendant] produced, prepared, propagated, compounded, converted or processed methamphetamine, either by extraction from substances of natural origin or by chemical synthesis, it would be your duty to return a verdict of guilty.

Defendant contends that this instruction was plain error because it allowed the jury to convict him “on theories of guilt which were not charged in the indictment.” We find this case analagous to *Tucker*, wherein the defendant was indicted for kidnapping under one theory and ultimately received an instruction on a different theory of kidnapping; and to *Brown*, where “the judge’s instructions permitted the jury in [the *Brown*] case to predicate guilt on theories of the crime which were not charged in the bill of indictment[.]” *Brown*, 312 N.C. at 249, 321 S.E.2d at 861; *see also Tucker*, 317 N.C. at 540, 346 S.E.2d at 422.

The State counters that the instruction “tracked exactly the Pattern Jury Instruction[.]” The State presents no support for its argument that an instruction that follows the pattern jury instruction cannot be in error. Further, we note that the instruction given did not “track exactly” the Pattern Jury Instruction. The Pattern Jury Instruction states:

The defendant has been charged with manufacture of (*name substance*), a controlled substance.

For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant manufac-

STATE v. HINSON

[203 N.C. App. 172 (2010)]

tured (*name substance*). (*Describe conduct*) of (*name substance*) would be manufacture of a controlled substance.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant (*describe conduct*) (*name substance*), it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt it would be your duty to return a verdict of not guilty.

N.C.P.I., Crim. 260.19. In the present case, where the Pattern Jury Instruction instructs the trial court to “describe conduct[,]” the trial court listed “[p]roducing, preparing, propagating, compounding, converting or processing methamphetamine, either by extraction from substances of natural origin or by chemical synthesis[.]” The trial court did not simply describe the sole method articulated by the indictment, to wit, that “[t]he manufacturing consisted of chemically combining and synthesizing precursor chemicals to create methamphetamine.” Instead, the trial court provided a list of every theory of manufacturing a controlled substance set forth in N.C.G.S. § 90-87. As our Court noted in *Turner*, “our Supreme Court has concluded that such a ‘slight difference’ is prejudicial and amounts to plain error.” *Turner*, 98 N.C. App. at 448, 391 S.E.2d at 527, citing *Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983); *see also State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 841 (1977) (holding that a trial court erred by reading to the jury a statute “in its entirety without pointing out to the jury which parts of it were material to the case,” thereby “permitt[ing] the jury to consider various theories of [the crime charged]”).

We further note our discussion above concerning the significance of the particular method of manufacture provided by N.C.G.S. § 90-87. As discussed above, a conviction for manufacture by activity consisting of “preparation” or “compounding” requires proof of the additional element of intent to distribute, which a conviction for manufacture by activity consisting of production, propagation, conversion, or processing would not. Because of this significant difference between the elements required to sustain a conviction, a variation between indictment and instruction such as the one at issue cannot be said to amount to only a “slight difference.”

Because of the variance between indictment and instruction, and in light of our case law, we find the trial court’s instruction to be plain error. We therefore grant Defendant a new trial on charge No. 06 CRS 1602, manufacture of a controlled substance.

STATE v. HINSON

[203 N.C. App. 172 (2010)]

Possession of Precursor Chemicals

[7] Defendant next argues that the trial court erred by “instructing the jury they could find [Defendant] guilty of possessing precursor chemicals under the theory of actual possession when there was insufficient evidence to support that theory.” We disagree.

“The trial court’s jury instructions on possible theories of conviction must be supported by the evidence.” *State v. Jordan*, 186 N.C. App. 576, 582, 651 S.E.2d 917, 921 (2007) (citation omitted). We review a jury instruction

contextually and in its entirety. The charge will be held to be sufficient if “it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. . . .” The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. “Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.”

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005); *see also State v. Allen*, — N.C. App. —, —, 684 S.E.2d 526, 534 (2009) (“Even assuming *arguendo* there was insufficient evidence in the record to support a flight instruction, [the] defendant must still demonstrate that the instructional error was prejudicial.”).

Defendant contends that the trial court erred in that “[n]one of the witnesses placed [Defendant] in actual possession of any precursor chemicals. [Defendant] was outside of the house when the witnesses interacted with him.”

After the State requested an instruction on actual possession, the trial court had the following discussion with Defendant’s attorney:

THE COURT: I’m going to give both sides because I think I need to define both to make clear—I guess, to override any of the jurors’ conceptions of possession. Their conceptions they may have brought with them about what constitutes possession.

[Defense Counsel]: Well, would you give them an instruction that I’m giving you these two definitions for the limited purpose of explaining the two different types of possession and there has been no evidence that [Defendant] possessed the precursor on March the 2nd, in that on March the 2nd, there was no evidence

STATE v. HINSON

[203 N.C. App. 172 (2010)]

that he had anything on his person and only instruct the jury to follow the law insofar as constructive possession is concerned?

THE COURT: I'm not going to go that far. I'm going to say possession may be either actual or constructive.

[Defense Counsel]: Okay.

THE COURT: And that the jury will have to recall the evidence and draw their own conclusions on that.

[Defense Counsel]: We would respectfully OBJECT to the giving of the actual possession instruction unless it's accompanied by the statement that on the date in question, there has been no evidence submitted that he had actual possession. . . .

THE COURT: All right, I would OVERRULE that objection.

The trial court then gave the following instruction to the jury:

[D]efendant has been charged with unlawfully possessing an immediate precursor chemical. For you to find . . . [D]efendant guilty of this offense, the State must prove two things beyond a reasonable doubt.

First, that . . . [D]efendant knowingly possessed pseudoephedrine and red phosphorous. Pseudoephedrine and red phosphorous are immediate precursor chemicals.

Possession of a substance may be either actual or constructive. A person has actual possession of a substance if he has it on his person, is aware of its presence and, either by himself or together with others, has both the power and intent to control its disposition or use.

A person has constructive possession of a substance if he does not have it on his person but is aware of its presence and has, either by himself or together with others, both the power and intent to control its disposition or use.

A person's awareness of the presence of the substance and his power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances. If you find beyond a reasonable doubt that a substance was found in a certain premises and that the defendant exercised control over those premises, whether or not he owned them, this would be a circumstance from which you may infer that . . . [D]efendant

STATE v. HINSON

[203 N.C. App. 172 (2010)]

was aware of the presence of the substance and had both the power and intent to control its disposition or use.

. . .

So if you find from the evidence beyond a reasonable doubt that on or about the alleged date, . . . [D]efendant knowingly possessed pseudoephedrine and red phosphorous and intended to manufacture a controlled substance or knew or had reasonable cause to believe it would be used to manufacture a controlled substance, it would be your duty to return a verdict of guilty.

While Defendant asserts there was insufficient evidence to support the trial court's instruction on actual possession, he fails to argue that "such error was likely, in light of the entire charge, to mislead the jury." *Blizzard*, 169 N.C. App. at 297, 610 S.E.2d at 253. Defendant has failed to show how the instruction would have misled the jury, nor has he argued how any potential error may have prejudiced Defendant. Reviewing the instruction contextually and in its entirety, it is clear that the explanations of both actual and constructive possession were given as a means of clarifying the instructions to the jury. We therefore find the instruction sufficient and overrule this assignment of error. However, because the conviction under 06 CRS 1603 for possession of precursor chemicals was consolidated for judgment with the conviction under 06 CRS 1602, we must remand for resentencing as to 06 CRS 1603. *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) ("[W]e think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.").

New trial in No. 06 CRS 1602; remanded for resentencing in No. 06 CRS 1603.

Judge STEPHENS concurs.

Judge STEELMAN concurs in part and dissents in part with a separate opinion.

STEELMAN, Judge, concurring in part and dissenting in part.

I fully concur with the majority opinion, with the exception of its analysis finding plain error and a fatal variance between the indictment and the trial judge's charge to the jury. As to this portion of the opinion, I must respectfully dissent.

STATE v. HINSON

[203 N.C. App. 172 (2010)]

The relevant portion of the indictment reads:

Manufacture methamphetamine, a controlled substance included in Schedule II of the N.C. Controlled Substances Act. The manufacturing consisted of chemically combining and synthesizing precursor chemicals to create methamphetamine.

The relevant portion of the trial court's instructions reads:

Producing, preparing, propagating, compounding, converting or processing methamphetamine, either by extraction from substances of natural origin or by chemical synthesis, would be manufacturing methamphetamine.

"A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. McWilliams*, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971) (citing *State v. Cook*, 263 N.C. 730, 140 S.E.2d 305 (1965); *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334 (1964), *overruled on other grounds*, *News & Observer v. State*, 312 N.C. 276, 322 S.E.2d 133 (1984); *State v. Taft*, 256 N.C. 441, 124 S.E.2d 169 (1962)).

While the trial court's instructions utilized slightly different words than the indictment, the import of both the indictment and the charge are the same. The manufacture of methamphetamine is accomplished by the chemical combination of precursor elements to create methamphetamine. The charge to the jury, construed contextually as a whole, was correct and without prejudice. I would find no error, much less plain error, in the charge given by the learned trial judge.

I further note that our Supreme Court, in the case of *State v. Odom*, stated that "when the 'plain error' rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (citation, quotation and internal alterations omitted). In determining whether a defect in a jury instruction amounts to plain error, we "must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (citing *United States v. Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L. Ed. 2d 1137 (1978)); *see also State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994). In the instant case, I would hold that a review of the whole record reveals no plain error mandating a new trial.

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

FIRST GASTON BANK OF NORTH CAROLINA, PLAINTIFF v. CITY OF HICKORY, VERA
AND ASSOCIATES, INC., VERA ENGINEERING, P.C., AND PETER J. VERA,
JR., DEFENDANTS

No. COA08-1017

(Filed 6 April 2010)

**1. Civil Procedure— depositions—non-party witnesses—
other lawsuits—summary judgment**

Defendant City of Hickory's challenge to plaintiff's reliance on depositions of non-party witnesses taken in other lawsuits to support the factual assertions at summary judgment and in its appellate brief was overruled. Rule 56(c) of the Rules of Civil Procedure does not limit depositions to those taken in the case in which the motion for summary judgment is pending and depositions that meet the requirements of an affidavit may be used in summary judgment proceedings.

2. Appeal and Error— hearsay—issue not preserved

Defendant City of Hickory's challenge on hearsay grounds to several documents in the record was not properly preserved for appellate review.

3. Real Property— inverse condemnation—summary judgment proper

The trial court properly granted summary judgment in favor of defendant City of Hickory on plaintiffs inverse condemnation claim because plaintiff failed to show that the flooding of plaintiff's storm drain pipe was a direct result of a government structure.

4. Negligence— insufficient evidence of a duty—summary judgment

The trial court did not err in granting summary judgment in favor of defendant City of Hickory on plaintiff's negligence claim because plaintiff failed to offer sufficient evidence that defendant owed plaintiff any duty to inspect or maintain a storm drainage pipe on plaintiff's property.

Appeal by plaintiff from order entered 21 December 2007 by Judge F. Donald Bridges in Catawba County Superior Court. Heard in the Court of Appeals 12 February 2009. Opinion filed 7 April 2009. Motion to amend record on appeal and withdraw opinion granted 24

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

April 2009. The following opinion supersedes and replaces the opinion filed 7 April 2009.

Smith, Cooksey & Vickstrom, PLLC, by Neil C. Cooksey and Steven L. Smith, for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Patrick H. Flanagan and Amy E. Fitzgerald, for defendant-appellee City of Hickory.

GEER, Judge.

This appeal arises out of litigation relating to a sinkhole that developed in 2005 when a storm drain collapsed on property owned by plaintiff First Gaston Bank of North Carolina (“First Gaston”) in Hickory, North Carolina. First Gaston appeals from the trial court’s entry of summary judgment in favor of the City of Hickory on First Gaston’s claims for negligence and inverse condemnation relating to the storm drain collapse. We hold that the trial court properly granted summary judgment on both claims. With respect to the negligence cause of action, First Gaston has failed to establish that the City owed any duty to the private property owner in connection with the drain. Further, no claim for inverse condemnation exists because First Gaston cannot demonstrate that the damage to its property was the direct result of a structure built by the City. There was, therefore, no taking.

Facts

In 2000, First Gaston financed the purchase of property in Hickory, North Carolina by SCA Morris, Inc. (“SCA Morris”). Diagonally crossing the property is an underground 96-inch in diameter storm drain made of corrugated metal. This pipe immediately connects upstream to an underground box culvert built in 1954 or 1955 by the Department of Transportation (“DOT”) underneath Highway 70. The pipe connects downstream with a pipe maintained by the City that runs under 7th Street, a street built by Home Depot and dedicated to the City in the 1990s.

In 2001, SCA Morris built a restaurant on the property. On 17 August 2002, during a heavy rainstorm, the storm drain crossing the property failed, and a large sinkhole developed. After obtaining an additional loan from First Gaston, SCA Morris retained Peter J. Verna, Verna Engineering P.C., and Verna and Associates, Inc. (“the Verna defendants”) to make the needed repairs on the property. In order to complete the project, the Verna defendants obtained building, plumb-

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

ing, electrical, and mechanical permits from the City. The repairs were finished in April 2003, and after the City inspected the property and certified it safe for occupancy, the restaurant reopened in July 2003.

In May 2004, the restaurant closed, and SCA Morris defaulted on its loans. First Gaston foreclosed on the property in September 2004. On 7 July 2005, a second sinkhole developed on the property due to a second failure of the storm drain. Shortly before the occurrence of the 2005 sinkhole, First Gaston had received an offer to purchase the property for \$1,200,000.00. After the 2005 sinkhole appeared, First Gaston sold the property for \$1.00.

On 24 May 2006, First Gaston brought an action against the City in Catawba County Superior Court, asserting a claim for negligence. On the same date, First Gaston filed a separate lawsuit against the Verna defendants. On 17 July 2006, First Gaston filed an amended complaint in the action against the City, adding a claim for inverse condemnation. The City filed an amended answer on 6 August 2007 that included cross-claims against the Verna defendants. On 10 May 2007, the trial court, with the consent of all parties, ordered the consolidation of the action against the City and the action against the Verna defendants.

The City filed a motion for summary judgment on 18 October 2007. On 21 December 2007, the trial court entered an order granting summary judgment to the City. First Gaston filed notice of appeal on 17 January 2008. The record on appeal, as filed in this Court, contained no indication that the claims against the Verna defendants had been resolved. Consequently, on 7 April 2009, this Court dismissed the appeal as interlocutory because the trial court's summary judgment order as to the City had not been certified for interlocutory appeal under Rule 54(b) of the Rules of Civil Procedure, and First Gaston had made no argument as to the existence of a substantial right that would be lost without immediate review.

On 23 April 2009, First Gaston filed a motion to amend the record on appeal to reflect that the claims against the Verna defendants were not pending, and the order granting summary judgment for the City was in fact a final judgment. The amendments to the record on appeal show that on the same day the trial court granted summary judgment for the City, the trial court also, in a separate order, entered summary judgment in favor of the Verna defendants. On 24 April 2009, this Court entered an order allowing First Gaston's motion to amend the

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

record on appeal to include the trial court's order granting summary judgment to the Verna defendants and withdrawing the opinion dismissing the appeal.

"It is the duty of the appellant to ensure that the record is complete." *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003). Rule 9(a)(1)(j) of the Rules of Appellate Procedure requires that the record on appeal in civil actions contain "copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings" Despite First Gaston's violation of this rule, we decline to impose sanctions, and we choose to review the merits of the appeal.

I

[1] As a preliminary matter, we must address the City's challenge to First Gaston's use of certain evidence to support the factual assertions in its appellate brief. The City first contends that First Gaston, in opposing summary judgment, improperly relied upon the depositions of four non-party witnesses that were taken in two other lawsuits. The City contends that because the depositions were not taken in this action, "[t]he depositions are not part of the forecast of evidence in this matter, nor are there any provisions allowing them to be used as such in the North Carolina Rules of Civil Procedure." The City cites no authority in support of this assertion.

Rule 56(c) of the Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(e) further provides that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Neither subsection of Rule 56 expressly limits "depositions" to those taken in the case in which the motion for summary judgment is pending, so long as the deposition is "on file" in the pending action.

Although not cited by the City, Rule 32(a) of the Rules of Civil Procedure does limit the use of depositions to use "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof" and to specified circumstances. Nevertheless, leading commentators and the better-reasoned opinions addressing the essentially identical federal Rule 32(a) have con-

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

cluded that this rule does not apply to hearings in which affidavits may be submitted, such as summary judgment proceedings under Rule 56.

In discussing Fed. R. Civ. Proc. 32(a), the leading commentator on the Federal Rules of Civil Procedure has explained that “depositions can be used more freely on motions than the rule would seem to indicate,” specifically pointing to Rule 56(c). 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Fed. Prac. & Proc. Civ.* § 2142 (2d ed. 1994). The treatise then explains: “A deposition is at least as good as an affidavit and should be usable whenever an affidavit would be permissible, even though the conditions of the rule on use of a deposition at trial are not satisfied.” *Id.*

The Ninth Circuit has similarly held:

Sworn deposition testimony may be used by or against a party on summary judgment regardless of whether the testimony was taken in a separate proceeding. Such testimony is considered to be an affidavit pursuant to Federal Rule of Civil Procedure 56(c), and may be used against a party on summary judgment as long as the proffered depositions were made on personal knowledge and set forth facts that were admissible in evidence.

Gulf USA Corp. v. Federal Ins. Co., 259 F.3d 1049, 1056 (9th Cir. 2001) (internal citations omitted). *See also Tingey v. Radionics*, 193 Fed. Appx. 747, 765, 2006 WL 2258872, *15 (10th Cir. 2006) (unpublished) (holding that trial court should not have struck under Rule 32(a) deposition taken in separate action because depositions may be treated as affidavits in summary judgment proceedings); *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 767-68 (8th Cir. 1992) (noting that “[t]he Federal Rules specifically allow depositions to be used in opposition to motions for summary judgment” and holding deposition may be used as affidavit in summary judgment proceeding); *Burbank v. Davis*, 227 F. Supp. 2d 176, 179 (D. Me. 2002) (holding that depositions from other actions are admissible in connection with motion for summary judgment as “sworn statements”); *Tormo v. Yormark*, 398 F. Supp. 1159, 1168-69 (D.N.J. 1975) (“Despite this language [in Rule 32], however, courts and commentators have rejected the notion that the rule governs the use of deposition testimony at a hearing or a proceeding at which evidence in affidavit form is admissible. The reasoning behind this rejection is that deposition testimony taken under oath, even if failing to satisfy Rule 32(a)’s requirements, is at least as good as affidavits.” (internal citations and quotation marks omitted));

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

Hastings Mut. Ins. Co. v. Halatek, 174 Ohio App. 3d 252, 257-58, 881 N.E.2d 897, 901-02 (2007) (holding that deposition from another case is as good as affidavit and, therefore, could be considered on summary judgment).

We find the above reasoning persuasive and hold that depositions, if they meet the requirements of an affidavit, may be used in summary judgment proceedings even if the party against whom the deposition is used was not present or represented at the taking of the deposition. The City objects, however, that it did not have an opportunity to cross-examine one of the witnesses.¹ As the Tenth Circuit has pointed out, the same objection can frequently be made as to affidavits filed in connection with motions for summary judgment:

Parties may file affidavits in support of summary judgment without providing notice or an opportunity to cross-examine the affiant. *See* Fed.R.Civ.P. 56(c). The “remedy” for this non-confronted affidavit testimony is to file an opposing affidavit, not to complain that one was not present and permitted to cross-examine when the affidavit was signed. . . . If [defendant] wished to controvert [the] testimony [of the witness in another action] for summary judgment purposes, it could either have noticed an additional deposition of [the witness], or presented additional testimony from its own expert to cast doubt on his conclusions. Therefore, the district court should not have struck [the witness’s] deposition under Rule 32(a).

Tingey, 193 Fed. Appx. at 765-66, 2006 WL 2258872 at *16.

In this case, the deponents were sworn, and the City has made no showing that the depositions fail to meet the requirements for affidavits set out in Rule 56(e) (“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”). We, therefore, hold that the depositions were properly submitted to and considered by the trial court and will also consider them.²

1. The City cites *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 691, 413 S.E.2d 268, 273 (1992), but that case addressed the admissibility of a deposition at trial under N.C.R. Evid. 804(b)(1) and not the use of depositions in connection with motions for summary judgment.

2. We note that the City has not suggested that any of the witnesses would be unavailable to testify at trial. Thus, just as an affidavit forecasts testimony intended to be presented at trial, so too the depositions at issue are forecasts of testimony First Gaston expects to elicit at trial.

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

[2] The City also challenges several documents in the record as inadmissible hearsay: (1) a letter from the Mayor of Hickory to a DOT Board member expressing concern over the DOT's decision to allow First Gaston to proceed with private repairs; (2) a series of e-mails and photographs from DOT officer Mark Leatherman; and (3) a letter from Assistant Attorney General Donald Teeter sent to SCA Morris on behalf of the DOT asking it to address several conditions on the property. The record does not, however, reveal that the City specifically objected at the trial level to consideration of these exhibits or, if any objection was made, that the trial court ruled upon that objection. The City is, therefore, precluded from challenging these exhibits for the first time before this Court. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.").

II

[3] Turning to the merits, we first address First Gaston's inverse condemnation or "taking" claim. A taking is defined as " 'entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.' " *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982) (quoting *Penn v. Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950)).

First Gaston argues that its claim falls within *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 243, 132 S.E.2d 599, 603 (1963), *overruled in part on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983). In *Midgett*, the plaintiff alleged that the State Highway Commission's construction of a highway that diverted ocean flood water onto his property was a taking. The Supreme Court agreed, explaining that "if a governmental agency maintains a nuisance, permanent in nature, causing damage to and diminution in the value of land, the nuisance is regarded and dealt with as an appropriation of property to the extent of the injury inflicted." *Id.* at 247-48, 132 S.E.2d at 606. The Court reasoned: "The right to have water flow in the direction provided by nature is a property right, and if such right of a landowner is materially interfered

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

with so that his land is flooded by the manner in which a highway is constructed, it is a nuisance and a taking of property for public use for which compensation must be paid.” *Id.* at 248, 132 S.E.2d at 606.

The Court explained further, however:

In order to create an enforceable liability against the government it is, at least, necessary that the overflow of water be such as was reasonably to have been anticipated by the government, *to be the direct result of the structure established and maintained by the government*, and constitute an actual permanent invasion of the land, or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property. To constitute a permanent invasion of property rights and an impairment of the value thereof the obstruction or structure need not be permanent in fact, but it must be permanent in nature. A permanent structure is one which may not be readily altered at reasonable expense so as to remedy its harmful effect, or one of a durable character evidently intended to last indefinitely and costing practically as much to alter or remove as to build in the first place. A segment of an improved highway is a structure of permanent nature.

Id., 132 S.E.2d at 607 (emphasis added) (internal citations omitted). The Supreme Court in *Lea Co.*, 308 N.C. at 614, 304 S.E.2d at 172, emphasized that this aspect of *Midgett* means that a plaintiff with an inverse condemnation claim based on flooding must show that “the increased overflow of water was such as was reasonably to have been anticipated by the State to be the direct result of the structures it built and maintained.”

First Gaston contends that the City’s “reckless” approval of development upstream from the subject pipe was a taking because it concentrated unreasonable amounts of storm water into the First Gaston pipe, which caused it to fail, thereby resulting in the 2005 sinkhole. In *Lea Co.*, 308 N.C. at 617, 304 S.E.2d at 174, however, the Supreme Court stressed:

Injury properly may be found to be a foreseeable direct result of government structures when it is shown that the increased flooding causing the injury would have been the natural result of the structures *at the time their construction was undertaken*. Injury caused in substantial part by subsequent or contemporaneous acts or construction by others is not a direct result of the government structures. A showing of injury caused by such subse-

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

quent or contemporaneous acts or construction will not support a finding that there has been a taking by the State. To require the State to anticipate the shifting of business and population centers and the attendant acts or construction by others contemporaneous with or subsequent to the State's construction, and to hold the State liable for a taking if it fails to do so, would place an unreasonable and unjust burden upon public funds. No such result is required by the Constitution of the United States or the Constitution of North Carolina.

Thus, for a taking to occur, the government must have constructed a permanent structure that caused the damage to the plaintiff's property.

In *Midgett*, the government-built highway was the structure that subjected the plaintiff's land to the nuisance. In *Lea Co.*, the government-built highway improvements were the structures that subjected the plaintiff's land to flooding. Here, there is no contention that a project built and maintained by the government caused the pipe to overflow. First Gaston has, therefore, failed to meet the first prerequisite of *Midgett* and *Lea Co.* for establishment of the existence of a taking: that the flooding of the First Gaston pipe was a direct result of a government structure.

Therefore, the trial court properly granted summary judgment on the inverse condemnation claim. *See also State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 371 (Mo. 2008) (rejecting plaintiffs' claim for inverse condemnation based on City's approval of private development plans that failed to adequately account for increased storm water created by development because it was private developer's improvements to land that caused plaintiffs' damages); *Phillips v. King County*, 136 Wash. 2d 946, 960-61, 968 P.2d 871, 878 (1998) (accord). Because of our resolution of this issue, it is unnecessary to discuss the parties' arguments as to the other elements of a taking claim.

III

[4] With respect to First Gaston's negligence claim, it is well established that "[i]n order to survive a defendant's motion for summary judgment in a negligence action, a plaintiff must set forth a prima facie case '(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

probable under the circumstances.’ ” *Strickland v. Doe*, 156 N.C. App. 292, 294, 577 S.E.2d 124, 128 (quoting *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996)), *disc. review denied*, 357 N.C. 169, 581 S.E.2d 447 (2003). “While summary judgment is normally not appropriate in negligence actions, where the forecast of evidence shows that a plaintiff cannot establish one of these required elements, summary judgment is appropriate.” *Id.* The parties primarily dispute the existence of a duty of care owed by the City to First Gaston.

A. Duty to Inspect and Maintain First Gaston Pipe Based on Control of Other Storm Water Management Pipes

First Gaston’s first theory of negligence is that the City is liable for the damage resulting from the failure of the privately-constructed storm drain pipe on First Gaston’s property because of the City’s maintenance and control of the City’s storm drain system. The general rule in this State is that “there is no municipal responsibility for maintenance and upkeep of drains and culverts constructed by third persons for their own convenience and the better enjoyment of their property unless such facilities be accepted or controlled in some legal manner by the municipality.” *Johnson v. City of Winston-Salem*, 239 N.C. 697, 707, 81 S.E.2d 153, 160 (1954).

First Gaston argues that this test is met because the City controls portions of the storm water management pipes above and below the pipe crossing First Gaston’s private property. According to First Gaston, the City, therefore, adopted the First Gaston pipe and can be held liable for damage stemming from the pipe’s failure. This Court recently rejected a similar claim in *Asheville Sports Props., LLC v. City of Asheville*, 199 N.C. App. 341, 683 S.E.2d 217 (2009).

In *Asheville Sports*, the plaintiffs contended that the City of Asheville adopted the storm water drainage pipes on their private property “by using them ‘as integral components of [its] municipal storm water runoff control and drainage system[.]’ ” *Id.* at 346, 683 S.E.2d at 220. Like First Gaston, the *Asheville Sports* plaintiffs relied heavily on *Hooper v. City of Wilmington*, 42 N.C. App. 548, 553, 257 S.E.2d 142, 145, *disc. review denied*, 298 N.C. 568, 261 S.E.2d 122 (1979), in which this Court held that the City could be held liable for negligent maintenance of a ditch on private property. This Court distinguished *Hooper*, noting that the plaintiffs’ pipes in *Asheville Sports* were not immediately connected with the City’s pipes, but rather

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

were connected to other private parties' pipes. 199 N.C. App. at 351, 683 S.E.2d at 223. We held that the plaintiffs' proffer of a map showing that at some point, water from the plaintiffs' pipe ran through other pipes owned by the City was insufficient to create an issue of fact as to whether the City had adopted the plaintiffs' pipes. *Id.*

First Gaston has cited nothing in the record other than evidence (1) that the City controls a portion of pipe further upstream, but not immediately adjacent to, the pipe on its property and (2) that, after running through the First Gaston pipe, storm water runoff flows into a pipe owned and maintained by the City. This is not sufficient evidence to create an issue of fact as to whether the City adopted the First Gaston pipe. *See also Mitchell v. City of High Point*, 31 N.C. App. 71, 75, 228 S.E.2d 634, 637 (1976) (holding that City's control and maintenance of two culverts upstream from plaintiffs' property did not mean that City had adopted entire stream).

Alternatively, First Gaston contends the City's oversight of the repairs on the First Gaston property following the 2002 sinkhole constituted adoption of the subject pipe and gave rise to a duty to inspect, repair, and maintain it. First Gaston points to the fact that City officials required (1) SCA Morris to locate the building 30 feet off the right of way, (2) to refrain from using the storm drain to dispose of water from their own property, (3) to build a separate storm drainage system for the property, and (4) to submit plans and specifications to and obtain approval from the City for all of the foregoing. According to First Gaston, "[s]uch control over the property itself justifies imposition of the *Milner Hotels* duty."

In *Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 537, 151 S.E.2d 35, 37-38 (1966), *modified on reh'g*, 271 N.C. 224, 155 S.E.2d 543 (1967), the Supreme Court held that the City could be held liable when a stream used by the City of Raleigh to drain storm water backed up due to debris in a culvert maintained by the City and flooded the plaintiff's property. The Supreme Court based its holding on allegations that the City had contracted with the State to maintain, inspect, and repair the culverts in the City and had, in fact, performed the promised maintenance. *Id.* Nowhere in *Milner Hotels* did the Court hold that a City's inspection of a private party's construction activities on private property gives rise to a duty by the City generally to inspect, maintain, and repair waterways and drainage systems on that property. *Milner Hotels* did not hold, and First Gaston cites no other case holding, that a City adopts a private storm drain pipe and

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

consequently undertakes a duty to maintain and repair that pipe simply by examining repairs made by the private property owner.³

Finally, First Gaston argues that a duty regarding the First Gaston pipe arose from the City's "exercis[ing] considerable dominion and control over development upstream from the [First Gaston] Property." First Gaston presented evidence that upstream development authorized by the City "substantially increased the volume of water in the storm drain under the Property causing the [First Gaston storm drain] to surcharge, pressurizing the pipe." First Gaston asserts that "[t]he City of Hickory cannot approve major commercialization of upstream property without considering the impact of the increased water flow on the downstream owners affected by the storm drain."

As its sole support for this argument, First Gaston relies on *Yowmans v. City of Hendersonville*, 175 N.C. 575, 577, 96 S.E. 45, 46 (1918), in which the trial court held the City liable for grading and paving its streets in such a way as to divert large quantities of water onto the plaintiff's lot, causing her drainage pipes to burst and flood her property. On appeal, the Supreme Court began by explaining that

it is very generally held here and elsewhere that while municipal authorities may pave and grade their streets and are not ordinarily liable for an increase of surface water naturally falling on the lands of a private owner, where the work is properly done, they are not allowed, from this or other cause, to concentrate and gather such waters into artificial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to the same and without making adequate provision for its proper outflow, unless compensation is made, and for breach of duty in this respect an action will lie.

Id. at 578, 96 S.E. at 47.

The Court explained further that the question of the City's liability turned on "whether [the City] ha[d] wrongfully turned its surface water on plaintiff's property, causing damage to same as alleged." *Id.* Phrased differently, "the question of defendant's responsibility should be made to depend chiefly on whether, having gathered and concen-

3. We note that the City has expressly declined to assume the duty asserted by First Gaston. Section 13.20.7 of the City's Land Development Code states: "If the City assists or has assisted private owners with the design, supply and/or installation of storm water management facilities, this does not imply any maintenance responsibilities by the City. The maintenance of all such facilities shall be the sole responsibility of the property owner(s)."

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

trated the surface water into artificial drains or sewers, it turned same on plaintiff's property in such manner and such volume that the injuries complained of were likely to result, and did result, under and from the conditions presented." *Id.* See also *Eller v. City of Greensboro*, 190 N.C. 715, 720, 130 S.E. 851, 853 (1925) ("The city can only be liable for negligence in not exercising skill and caution in the construction of its artificial drains and watercourses. It is bound to exercise ordinary care and prudence. If [city streets] are so constructed as to collect and concentrate surface water that such an unnatural flow in manner, volume and mass is turned and diverted onto the lower lot, so as to cause substantial injury, the city is liable.").

Thus, in *Yowmans* and *Eller*, the Supreme Court recognized that a municipality has a duty to use due care when it makes improvements to its streets and when it directs water into storm drains. Both *Yowmans* and *Eller* impose liability based only on the municipality's own improvements causing additional runoff. Indeed, the Supreme Court in *Geo. A. Hormel & Co. v. City of Winston-Salem*, 263 N.C. 666, 675, 140 S.E.2d 362, 368 (1965), expressly limited *Yowmans* and *Eller* to allegations that the City "gather[ed] and concentrate[d] surface waters into artificial drains or sewers and turn[ed] them on a person's property in such manner and such volume" that injury occurred. Here, First Gaston has made no showing that the City has itself gathered and concentrated surface waters and sent them into the storm drain system in a volume that caused First Gaston's pipe to fail.

First Gaston has cited no authority that supports its contention that a City can be held liable for damage to a privately-constructed storm drain when its only involvement in creating the additional storm water volume was in approving private development that, when constructed, resulted in increased runoff. Its theory, if allowed, would appear to substantially negate the well-established law in North Carolina limiting municipal liability for failure of privately-constructed storm drains to specified circumstances. We believe that such a departure needs to come from the Supreme Court. See *Cootey v. Sun Inv., Inc.*, 68 Haw. 480, 486, 718 P.2d 1086, 1091 (1986) (holding with respect to claim against county based on increased runoff due to development: "The task of the government employees is to review the development plans submitted by the owner or developer to assess compliance with the law. While we do not condone negligence in the performance of this task, neither do we believe that the

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

government employees are required to conduct their own engineering studies to ensure the validity and correctness of the developer's plans. To require the County to do so would place the County as an insurer of the adequacy of Sun Investment's plans, designs and installation of subdivision facilities.").

B. Negligence Liability Based on Failure to Inspect and Maintain 7th Street Pipe

First Gaston next contends that the City's negligence in failing to inspect, maintain, and repair the downstream 7th Street pipe was a proximate cause of the First Gaston pipe's failure. The parties do not dispute that the City owned the 7th Street pipe and had a duty to maintain it, but do dispute whether there is sufficient evidence in the record to show that any breach of the City's duty to inspect, maintain, and repair the 7th Street pipe was the proximate cause of the First Gaston pipe's failure.

First Gaston's two expert witnesses specifically stated that they had not formed any opinion as to whether the 7th Street pipe caused or contributed to the failure of the First Gaston pipe. As its sole evidence on the issue of causation, First Gaston points to the testimony of Peter Verna and David Frailey (an employee of Verna and Associates, Inc.). First Gaston contends that "[b]oth Mr. Frailey and Mr. Verna believed that the design and maintenance of the pipe under 7th Street *may have contributed* to the problems upstream on the [First Gaston] property." (Emphasis added.) Even assuming *arguendo*, that "may have" evidence would be sufficient on summary judgment, we do not read the cited testimony as supporting a finding of causation.

The testimony of Mr. Frailey cited by First Gaston relates only to his opinion that (1) there was a poor connection between the pipe crossing the First Gaston property and the 7th Street pipe, and (2) there was debris in the 7th Street pipe. First Gaston points to no testimony by Mr. Frailey regarding whether the connection and the debris caused or contributed to the failure of the First Gaston pipe in 2005. Although Mr. Verna did address causation, he expressed only an opinion regarding whether the 7th Street pipe caused the 2002 collapse and not the 2005 collapse of the First Gaston pipe. Consequently, First Gaston has presented no evidence that the maintenance of the 7th Street pipe caused or contributed to the development of the sinkhole in 2005. The trial court did not, therefore, err in concluding that this evidence was insufficient to send the issue of negligence to the jury.

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

C. Liability Based on Negligence in Approval and Oversight of Repairs

Finally, First Gaston contends the City breached several duties in connection with its issuance of a building permit and oversight of the repairs on the property. According to First Gaston, the City breached its duty to enforce the Hickory Land Development Code by negligently issuing a building permit to the Verna defendants without requiring their compliance with that code.⁴ First Gaston then asserts that, in addition, by issuing the building permit, the City assumed a duty to inspect the repairs made by the Verna defendants to the storm water pipe. According to First Gaston, once the City observed the repairs and knew or should have known they were inadequate or improperly done, the City had a duty to refrain from issuing a certificate of occupancy for the property and had a duty to warn First Gaston of the problems with the pipe.

The City responds initially that the public duty doctrine applies to shield the City from any liability in this instance. “Under the public duty doctrine, governmental entities have no duty to protect particular individuals from harm by third parties, thus no claim may be brought against them for negligence.” *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 495 (2002).

This argument, however, is foreclosed by *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650 (2000), in which our Supreme Court declined to apply the public duty doctrine to a claim against Lee County for negligent inspection of a house. The Court held: “This Court has not . . . applied the public duty doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement. After careful review of appellate decisions on the public duty doctrine in this state and other jurisdictions, we conclude that the public duty doctrine does not bar this claim against Lee County for negligent inspection of plaintiffs’ private residence.” *Id.* at 465, 526 S.E.2d at 652. *See also Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000) (“[W]e have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public. We decline to

4. We note that Article 13 of the Land Development Code, which contains all of the sections cited by First Gaston, does not appear to apply to the repairs of the First Gaston pipe. That Article appears to come into play only for new construction or construction that will increase or alter the flow of storm water runoff. The pipe repairs in this case did not fall into either category.

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

expand the public duty doctrine in this case. Thus, the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell* [*v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991),]” in which the Court addressed only “the issue of whether the sheriff negligently failed to protect the decedent.” (internal citations omitted)). Since this case does not involve negligence by a local law enforcement department, the public duty doctrine does not apply.

Turning to the merits, even assuming, without deciding, that the duties First Gaston describes arose in this case, First Gaston still must show that the duty was owed to First Gaston. At the time of the repairs, SCA Morris owned the property. First Gaston was not the owner or occupant of the property until long after the repairs were completed.

First Gaston first cites *Watts v. N.C. Dep’t of Env’t & Natural Res.*, 182 N.C. App. 178, 641 S.E.2d 811 (2007), *aff’d in part*, 362 N.C. 497, 666 S.E.2d 752 (2008), as support for its argument that the City owed First Gaston a duty of care in its inspection and oversight of the repairs.⁵ In *Watts*, 182 N.C. App. at 180, 641 S.E.2d at 815, the plaintiff brought a claim for negligent inspection after he purchased land in reliance on a certification by the County Health Department that it was suitable for a sewage system. The Court held the Department owed the plaintiff an individual, special duty of care because it “made a promise” that plaintiff could build a three-bedroom home on the property when it issued the permit. *Id.* at 184, 641 S.E.2d at 817. Thus, in *Watts*, the Court held the County owed a duty to *the owner of the property*, to whom it had certified the property as suitable. As First Gaston was not the owner when any permit was issued and has made no showing that any promise was made to it, *Watts* is inapplicable.

First Gaston also points to *Oates v. JAG, Inc.*, 314 N.C. 276, 277, 333 S.E.2d 222, 224 (1985), as support for its argument that the City owed the bank a duty even though First Gaston purchased the property more than a year after (1) the repairs were made and (2) the City allowed the restaurant on the property to reopen. In *Oates*, the defendant constructed a house on an unimproved lot of land and sold it. The person who bought it then sold the house and lot to a second purchaser. The plaintiffs bought the house and lot from the second purchaser. After moving into the house, they discovered numerous

5. First Gaston also cites *McCoy v. Coker*, 174 N.C. App. 311, 620 S.E.2d 691 (2005), *Wood*, and *Thompson* for this point. Although these cases deal with negligent inspection claims, they address the applicability of the public duty doctrine and other immunity issues not before us in this case.

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

defects, including a failure to conform with provisions of the North Carolina Uniform Residential Building Code. *Id.* The plaintiffs sued the defendant for negligence. The trial court allowed the defendant's motion to dismiss, and the plaintiffs appealed. *Id.* at 278, 333 S.E.2d at 224. On appeal, the Supreme Court held that "a subsequent purchaser can recover in negligence against the builder of the property if the subsequent purchaser can prove that he has been damaged as a proximate result of the builder's negligence." *Id.* at 281, 333 S.E.2d at 226.

First Gaston contends that under *Oates*, the City owed a duty to First Gaston as "the subsequent purchaser for value" of the property. In *Oates*, however, the Court held that a subsequent purchaser can recover from *the builder or owner of the property*. It did not address the question whether a subsequent purchaser could recover from someone other than the builder or owner of the property.

In *Everts v. Parkinson*, 147 N.C. App. 315, 318, 555 S.E.2d 667, 670 (2001), this Court declined to extend the *Oates* rule as broadly as First Gaston urges. In *Everts*, the plaintiffs purchased a house from the original owners and discovered water intrusion and wood rot problems requiring extensive repairs. They subsequently filed suit against the builders of the house ("ATD") and the company that performed improvement work on the house ("PSC"). *Id.*

With respect to ATD, the complaint alleged that the original owners of the house called the president of ATD and asked him to come to the house to look at a problem with some brick molding on a window and give them a price on replacing it. *Id.* at 333, 555 S.E.2d at 679. The president went to the house and examined the particular window, but was not asked and did not look at any other windows. Ultimately, ATD did not perform any of the repair work. The Court held these allegations failed to allege that the company had a duty of care to the plaintiffs and affirmed the grant of summary judgment in ATD's favor. *Id.*

The Court explained:

The law imposes upon the builder of a house the general duty of reasonable care in constructing the house to anyone who may foreseeably be endangered by the builder's negligence, including a subsequent owner who is not the original purchaser. *See Oates v. JAG, Inc.*, 314 N.C. 276, 280-81, 333 S.E.2d 222, 225-26 (1985). Pursuant to *Oates*, ATD, as the builder of the house, owed a general duty of reasonable care to plaintiffs *in its construction of*

FIRST GASTON BANK OF N.C. v. CITY OF HICKORY

[203 N.C. App. 195 (2010)]

the house in 1988. However, as noted above, plaintiffs on appeal argue only that ATD was willfully and wantonly negligent *in its inspection of the window, which occurred over three years after the house was constructed.* Thus, plaintiffs essentially request this Court to significantly extend the rule in *Oates* and hold that the builder of a house, who is called upon by the original owner to inspect the house for damage more than three years after the house is completed, and who performs no repair work on the house at that time, owes a legal duty of care to a subsequent owner *in its inspection of the house.* This we decline to do. Because plaintiffs are unable to establish the existence of a legal duty of care owed to plaintiffs by ATD under the circumstances, summary judgment was properly granted.

Id. at 333-34, 555 S.E.2d at 679.

The plaintiffs also alleged PSC negligently repaired the defects, failed to report the defects caused by stucco on the house, and failed to advise the original owners of the need for further inspection and testing to verify the nature and extent of the water intrusion damage to the home. *Id.* at 334, 555 S.E.2d at 679. This Court held that the repair company PSC also owed no duty of care to the plaintiffs, explaining:

We are unable to find, and plaintiffs have not directed our attention to, any cases holding that a party who undertakes to *repair* a house under contract with the original owner owes a duty of care to a subsequent purchaser of the house. As with plaintiffs' claim against ATD, such a holding would require us to extend the rule in *Oates*, in which case it was held that the law imposes upon the *builder* of a house the general duty of reasonable care in *constructing* the house to anyone who may foreseeably be endangered by the builder's negligence, including a subsequent owner. *See Oates*, 314 N.C. 276, 333 S.E.2d 222. We decline to so extend the rule in *Oates*. We believe PSC did not owe plaintiffs a duty of care recognized by law under the circumstances.

Id., 555 S.E.2d at 679-80.

We believe *Everts* to be directly on point. In that case, the Court declined to extend a duty on the part of the original construction company or a subsequent repair company to a subsequent purchaser of the house. Similarly, here we decline to extend any duty owed by the City to the original owner as a result of inspections of the pipe to

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

someone who purchased the property more than a year later. *See also Lynn v. Overlook Dev.*, 328 N.C. 689, 696, 403 S.E.2d 469, 473 (1991) (holding that no duty to subsequent purchaser of property arose out of City's issuance of building permit to developer). Accordingly, since First Gaston has failed to demonstrate that the City owed First Gaston any duty, the trial court properly declined to allow First Gaston to proceed on this negligence theory.

Conclusion

In sum, we conclude First Gaston has failed to present evidence of conduct constituting a taking sufficient to support a claim for inverse condemnation. Further, First Gaston has not demonstrated a genuine issue of material fact as to the existence of any duty on the part of the City to inspect, maintain, and repair the pipe or to warn First Gaston of the condition of the pipe crossing the property ultimately purchased by First Gaston. First Gaston has also failed to present evidence that any negligence in the maintenance of the 7th Street pipe caused First Gaston's injury. Because of our resolution of these issues, we do not address the issue of any contributory negligence on the part of First Gaston. We, therefore, affirm the trial court's grant of summary judgment to the City.

Affirmed.

Judges STEELMAN and STEPHENS concur.

AJAMU GAINES, JR., A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, SCOTT HANCOX; AND
AJAMU GAINES, SR., PLAINTIFFS V. CUMBERLAND COUNTY HOSPITAL SYSTEM,
INC., A/K/A CAPE FEAR VALLEY HEALTH SYSTEM AND/OR CAPE FEAR VALLEY
MEDICAL CENTER; CAPE FEAR ORTHOPAEDIC CLINIC, P.A.; KAREN V.
JONES, M.D.; THOMAS R. TETZLAFF, M.D.; AND JOHNNY KEGLER, A/K/A JASON
WILLIS, CAROLINA REGIONAL RADIOLOGY, P.A.; AND BEVERLY A. DAVIS, M.D.,
DEFENDANTS

No. COA07-1419-2

(Filed 6 April 2010)

1. Medical Malpractice— failure to detect child abuse—hospital employees—issue of fact

Summary judgment was incorrectly granted for defendant Cape Fear Valley on a claim that its employees failed to detect signs of child abuse which proximately caused a subsequent

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

injury. There was an issue of fact in that plaintiffs submitted evidence from a doctor and a nurse asserting that defendant's employees breached the standard of care while a DSS investigator testified that no investigation would have followed a report from defendant's employees.

2. Medical Malpractice— failure to detect child abuse—radiologist—summary judgment

Plaintiffs forecasted sufficient evidence against defendants Dr. Davis and Regional Radiology to withstand summary judgment in a medical malpractice claim arising from the failure to detect child abuse and a subsequent injury. Dr. Davis did not notify DSS of potential child abuse or inform any other physician or nurse about the suspicious findings.

3. Medical Malpractice— failure to detect child abuse—not reviewing x-ray report or personally taking history

Plaintiffs forecasted sufficient evidence against Dr. Tetzlaff to withstand summary judgment on a medical malpractice claim arising from the failure to detect child abuse. There was evidence that Dr. Tetzlaff did not review an x-ray report and did not personally take a history.

4. Medical Malpractice— failure to detect child abuse—follow-up visits

Plaintiffs forecasted sufficient evidence against Dr. Jones and Cape Fear Orthopaedic Clinic to withstand summary judgment in a medical malpractice action claiming that failure to detect child abuse led to further injuries. These defendants were the medical providers who saw the child during four follow-up visits.

5. Medical Malpractice— failure to detect child abuse—testimony not speculative

The expert testimony in a medical malpractice case arising from the failure to detect child abuse was based on facts rather than speculation and, viewed in the light most favorable to plaintiffs, was sufficient to withstand summary judgment. Testimony about what DSS would have done had a report been made earlier came from a physician with a long-standing relationship to DSS and expertise in its policies.

Appeal by plaintiffs from judgment entered 17 April 2007 by Judge Ola M. Lewis in Cumberland County Superior Court. Petition for Rehearing granted 24 April 2009.

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

Faison & Gillespie, by Reginald B. Gillespie, Jr.; and Conley Griggs, LLP, by Cale H. Conley and Richard A. Griggs, Atlanta, Georgia, pro hac vice; and William S. Britt, for plaintiffs-appellants.

Cranfill, Sumner & Hartzog, LLP, by Norwood P. Blanchard, III, John D. Martin, and Katherine C. Wagner, for defendant-appellee Thomas R. Tetzlaff, M.D.

McGuire Woods, LLP, by Mark E. Anderson and Monica E. Webb for defendant-appellee Cumberland County Hospital System, Inc.

Manning, Fulton & Skinner, PA, by Robert S. Shields, Jr. and Katherine M. Bulfer, for defendants-appellees Beverly A. Davis, M.D. and Carolina Regional Radiology, P.A.

Ellis & Winters, LLP, by Alex J. Hagan and Alexander M. Pearce, for defendants-appellees Cape Fear Orthopaedic Clinic, P.A. and Karen V. Jones, M.D.

HUNTER, Robert C., Judge.

This case was originally decided 17 February 2009. *See Gaines ex rel. Hancox v. Cumberland County Hosp. System, Inc.*, — N.C. App. —, 672 S.E.2d 713 (2009). On 24 April 2009, Plaintiffs' Petition for Rehearing was granted. After careful review upon rehearing, we find that, at the summary judgment stage, plaintiffs forecasted sufficient evidence to create a genuine issues of material fact as to whether defendants breached the standard of care, and whether that breach was a proximate cause of the minor plaintiff's subsequent brain injury. Accordingly, defendants' motion for summary judgment was improperly granted.

On 1 September 2005, plaintiffs Ajamu Gaines, Sr. and Ajamu Gaines, Jr. ("Ajamu"), through his guardian ad litem, filed a complaint against defendants Cumberland County Hospital System, Inc., a/k/a Cape Fear Valley Health System and/or Cape Fear Valley Medical Center ("CFVMC"); Cape Fear Orthopaedic Clinic, P.A. ("Cape Fear Orthopaedic Clinic"); Karen Jones, M.D. ("Dr. Jones"); Thomas R. Tetzlaff, M.D. ("Dr. Tetzlaff"); and Johnny Kegler ("Kegler"), a/k/a Jason Willis.

On 12 April 2006, plaintiffs filed an amended complaint, adding claims against Carolina Regional Radiology, P.A. ("Regional Radi-

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

ology”) and Beverly A. Davis, M.D. (“Dr. Davis”). Plaintiffs alleged that defendants were negligent in that they “failed to discover or diagnose . . . prior abuse and/or neglect of Ajamu Gaines, Jr., despite the availability of existing evidence that would give rise to a suspicion of such abuse and neglect[.]” Plaintiffs further asserted that there was a causal link between defendants’ alleged negligence and Ajamu’s injuries. On 30-31 January 2007, all defendants, except Kegler, filed motions for summary judgment, which were presented as “one joint motion from all defendants.”

An order granting the motion for summary judgment was entered 17 April 2007, concluding that “there is no genuine issue as to any material fact . . . and that the moving defendants are entitled to judgment as a matter of law.” Plaintiffs timely appealed to this Court.

I. Background

On 15 April 2003, Ajamu arrived at CFVMC with a wrist injury. Ajamu claimed that the injury occurred when he jumped off the porch of his house; however, there was some discrepancy in his story as to whether he jumped or fell off the porch. After x-rays were performed, Ajamu was diagnosed with “100% displaced right distal radius and ulnar metaphyseal fractures.” Dr. Jones, who was employed by Cape Fear Orthopaedic Clinic, was listed as Ajamu’s attending physician and upon examination of Ajamu’s wrist, she recommended surgery to repair the fractured bones.

During surgery, Ajamu vomited. Due to a possibility that Ajamu could develop aspiration pneumonia, Dr. Jones ordered a chest x-ray. Dr. Davis, who was employed by Regional Radiology, examined the chest x-ray and noted in her report that there was an “old fracture deformity left posterolateral 9th rib.” The report was verified by Dr. Davis at 12:42 a.m. on 16 April 2003, and the report was immediately available for other physicians to review through the hospital’s computer system.

Dr. Jones then saw Ajamu at 8:00 a.m. on 16 April 2003, but she had not yet read the chest x-ray report. Dr. Jones cleared Ajamu for release contingent upon the results of a pediatric consultation. Dr. Tetzlaff, a pediatrician, performed this consultation at approximately 9:20 a.m. on 16 April 2003. After a brief physical examination, Dr. Tetzlaff ordered a second chest x-ray. Nurse Practitioner Cinthia Fletcher obtained a history and performed an examination of Ajamu outside the presence of Dr. Tetzlaff. She noted, “[t]his is a 6-year-old who was playing at home, jumped off the porch, and one of his shoes

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

came off and he tripped over the steps and fell on his arm.” This account by Ajamu constituted a third variation since his arrival at the hospital. Dr. Tetzlaff did not review or sign the consult note. Dr. Tetzlaff did not review the chest x-ray or read the report of Dr. Davis, but saw a note by Dr. Shaider, an anesthesiologist, that the x-ray of the lungs was “clear[.]” The second x-ray report showed that the lungs were clear and did not mention the old rib fracture. Plaintiffs presented evidence that the results of the second x-ray were not available for review until 3:00 p.m. and Dr. Tetzlaff released Ajamu from the hospital at 2:40 p.m., which indicates that Dr. Tetzlaff did not review the second chest x-ray report that he ordered. Upon Ajamu’s discharge, Dr. Tetzlaff advised Ajamu’s mother to follow up with Dr. Jones at Cape Fear Orthopaedic Clinic. Ajamu’s chart at CFVMC contained a primary diagnosis, which was the wrist fracture, and a secondary diagnosis, “[f]alling from residential premise, undetermined if accident/purposely inflicted.”

Ajamu saw Dr. Jones for four follow-up appointments between 23 April and 23 June 2003. None of Ajamu’s physicians reported any suspicion of child abuse to the Department of Social Services (“DSS”). On 3 July 2003, Ajamu returned to CFVMC after suffering a traumatic head injury. Despite the fact that a pediatric admission assessment was filled out that day indicating potential child abuse, DSS was not contacted until after Dr. Sharon Cooper (“Dr. Cooper”) examined Ajamu on 10 July 2003. Dr. Cooper, an expert witness for plaintiffs, is a pediatrician in Fayetteville with privileges at CFVMC. A skeletal survey of Ajamu was ordered on 10 July 2003, which revealed three other rib fractures, in addition to the 9th rib fracture previously identified on 16 April 2003 by Dr. Davis.

Dr. Cooper testified that 56 total injuries were present in July 2003 when Ajamu arrived at the hospital with severe head trauma. Dr. Cooper testified that the following injuries were, more likely than not, present in April 2003 when Ajamu came to the hospital with a wrist fracture, which should have resulted in suspicion of child abuse and a report to DSS.

1. Torn and healed upper frenulum
2. Deformation of right wrist (old fracture of right radius and ulna)
3. Three older deep scars over right nasolabial region.
4. Scar on chest at 3rd rib line

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

5. Gauge [sic] mark on right elbow
6. Linear scar medial to right scapula
7. Linear scar medial to left scapula
8. Curvilinear scar on mid thorax
9. Linear scar beneath left buttocks
10. Bruise on left thigh
11. Fracture of 9th rib
12. Fracture of 11th left rib
13. Fracture of 11th right rib

A DSS investigation resulted in the arrest of Kegler, the boyfriend of Ajamu's mother, for child abuse. Kegler had an outstanding warrant against him for other criminal activity. Due to the injuries inflicted by Kegler, Ajamu is now a quadriplegic and has permanent brain damage.

II. Standard of Review

The law is clear with regard to the trial court's review of a motion for summary judgment and the standard of review for this Court:

A trial court should grant a motion for summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The moving party carries the burden of establishing the lack of any triable issue. The movant may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. All inferences of fact must be drawn against the movant and in favor of the nonmovant.

Lord v. Beerman, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (internal citations and quotation marks omitted) (alteration omitted). "We review a trial court's grant of summary judgment *de novo*." *Id.*

"To survive a motion for summary judgment in a medical malpractice action, a plaintiff must forecast evidence demonstrating 'that the treatment administered by [the] defendant was in negligent viola-

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

tion of the accepted standard of medical care in the community[,] and that [the] defendant's treatment proximately caused the injury.' " *Id.* at 293-94, 664 S.E.2d at 334 (quoting *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978)).

While defendants argue that the standard of care was not breached, the crux of this case is whether any breach by defendants was a proximate cause of Ajamu's brain injury.

Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984).

"[I]t is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. Proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *Williams v. Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (citation and quotation marks omitted). "Causation is an inference of fact to be drawn from other facts and circumstances." *Turner v. Duke University*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989).

"In a medical negligence case, '[t]he connection or causation between the negligence and [injury] must be probable, not merely a remote possibility.' " *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008) (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)), *cert. denied*, 363 N.C. 372, 678 S.E.2d 232 (2009). "Our courts rely on medical experts to show medical causation. . . . When this testimony is based merely upon speculation and conjecture, however, it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation." *Id.* (internal citation omitted). We will now review the evidence presented in the light most favorable to plaintiffs as it pertains to each defendant.

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

*III. Standard of Care & Proximate Cause Testimony*A. Cumberland County Hospital System, Inc., a/k/a Cape Fear Valley Health System and/or Cape Fear Valley Medical Center

[1] Plaintiffs allege that the employees of CFVMC, including physicians and nursing staff, failed to detect present signs of child abuse in April 2003, which was a breach of the standard of care and was a proximate cause of Ajamu's subsequent injury.¹

CFVMC had policies in place in April 2003 regarding potential-child abuse. At that time, CFVMC had a specific administrative policy on "Child Maltreatment," which stated that CFVMC staff "are expected to report cases in which there is a reasonable cause to believe that a child has been a victim of maltreatment and/or may be in need of protective services," and that "maltreatment prevention is a significant component of the hospital mission." The policy included "fractures" as a common example of physical abuse. In April 2003, CFVMC utilized a "Pediatric Admission Assessment" form, which included a specific "abuse/neglect screen" section. The indicators to be considered included "multiple injuries in various stages of healing," "inappropriate injury or degree of injury versus history," and "conflicting histories of injury." The record reveals that in April 2003, CFVMC did not conduct an abuse/neglect screen when Ajamu was admitted.

Plaintiffs submitted a signed affidavit by Nurse Beatrice Yorker ("Nurse Yorker"), in which she asserts that the nurses of CFVMC did not comply with the standard of care in this case, in part because of their failure to perform a complete Pediatric Admission Assessment form. Nurse Yorker listed several other breaches of the standard of care by the nurses at CFVMC and asserts that these breaches were a proximate cause of Ajamu's injuries. Nurse Yorker was also deposed and testified consistent with her affidavit.

Dr. Cooper also testified as to CFVMC's breach of the standard of care. At her deposition, the following dialogue took place:

Q. Is it your opinion that the hospital did anything in this case that was not up to that standard of care?

1. Defendants Dr. Davis, Dr. Jones, and Dr. Tetzlaff were sued in their individual capacities, but these physicians also had privileges to practice at CFVMC. Plaintiffs allege that the hospital is jointly and severally liable due to the negligence of its physicians and staff.

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

- A. I feel that the standard of care was not met in this particular case.
- Q. Tell me in which ways you think the standard of care was not met by the hospital or its employees.
- A. This—the standard of care was not met in this particular case because first of all the child—non-accidental trauma should always be considered when a child comes in with a significant injury. Fractures are significant injuries. Second of all, when you have the presence of new and old injuries, particularly fracture injuries, a more thorough evaluation should be pursued. Third, health care providers, particularly in a hospital setting, but all health care providers, are mandated reporters to child protective services of suspected child abuse. There must be an index of suspicion. You don't have to know for sure that abuse has occurred. And if a suspected child abuse is not reported to DSS by hospital personnel, and it could have been reported by any personnel, it doesn't have to have been the primary care physician or the anesthesiologist, it can be any health care provider in the—in the hospital setting. If that does not happen, the child is at risk for subsequent further injury. The fourth point is that the standard of care is that if you order tests, you should review those tests, preferably before the patient is discharged from the hospital

Dr. Cooper went on to state that the physicians of CFVMC did not properly acknowledge the 9th rib fracture, an indicator of child abuse, particularly when coupled with a new injury. She also stated that the emergency department did not take a thorough history of Ajamu. She further claimed that the standard of care was breached by the hospital's failure to properly screen Ajamu under the hospital's child maltreatment policy, which she helped formulate.

With regard to proximate cause, Dr. Cooper testified: "I also feel very strongly that Ajamu would not be like he is today had we [the physicians and staff of CFVMC] done our job appropriately in April of 2003." Dr. Cooper also testified that defendants' negligence "clearly contribut[ed] as [] a proximate cause to the ultimate outcome of this catastrophic head trauma injury" Dr. Cooper testified at length concerning DSS involvement, which supports the notion that had the hospital properly notified DSS, Ajamu would have been removed from the home and the injury would not have occurred:

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

- Q. How do we know that steps would have been taken to prevent these subsequent injuries without speculating?
- A. Okay. This case, if I could use a colloquial expression, it's somewhat of a no-brainer of a case in the sense that had a report been made in April . . . DSS would have gone to the home. The first thing that DSS routinely does when they begin to talk to parents where a report has been initiated is they do a background check. They would have immediately found out that Mr. Kegler was a fugitive from justice. That would have been the first thing that would have become evident. . . . Knowing that this man had warrants out for his arrest in several different states, had an alias and was living in this home would have put a stop right away for DSS allowing him to have care of these children subsequently.
- Q. And what's the basis for that opinion?
- A. That's my experience with DSS and also the fact that I teach DSS and have been an instructor for DSS for several years.

Each defendant argues that Dr. Cooper's testimony is speculative, particularly with regard to what DSS would have done. However, Dr. Cooper has extensive experience working with and instructing DSS on child abuse matters, as evidenced by her testimony and curriculum vitae.² Dr. Cooper testified:

- Q. How do you know how DSS works?
- A. Because fortunately Cumberland County and Harnett County and the Cape Fear region have not [sic] huge Child Protective Services agencies and departments. And I would have to tell you I know almost every single DSS worker—investigative worker for Child Protective Services. I certainly know all of the supervisors and I'm very good friends with the overall

2. It does not appear from the record that defendants ever challenged Dr. Cooper's credentials or qualifications as an expert at the trial court. However, we note that it is well established that "a person is not permitted to offer expert testimony on the appropriate *standard of care* unless he qualifies under the provisions of Rule 702(b)(2) of the Rules of Evidence." *Andrews v. Carr*, 135 N.C. App. 463, 469, 521 S.E.2d 269, 273 (1999) (emphasis added), *disc. review denied*, 351 N.C. 471, 543 S.E.2d 483 (2000). When the expert testimony pertains to *causation*, the testimony is competent "as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703[.]" *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 49, 575 S.E.2d 797, 802, *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003).

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

director of DSS. But in addition to my knowing these individuals and working with them one-on-one on a weekly basis, I also have interacted with DSS as a trainer . . . numerous times either directly through DSS upon their request or else through our child advocacy center which sets up trainings for DSS workers and I'm one of the trainers that they typically will call in to provide trainings both through our child advocacy directive in Chapel Hill.

- Q. From that experience have you gained understanding and personal knowledge of when they take steps like running a background check or . . . interviewing parents or like visiting the home or to observe what's present or like putting a Protection Plan in place?
- A. Yes. That's why I know that DSS and the sheriff's department or the police department work hand-in-hand because DSS cannot do an NCIC background check and that's why I have the sheriff's department to do that. And of course, the sheriff's department is typically notified at the same time DSS finds out about a possible child abuse case because usually there's a criminal action that takes place, so that's another—that's another team. I'm frequently a part of that team . . .

Defendants in this case point to the testimony of DSS investigator Rosemary Zimmerman ("Zimmerman"), who claimed that had a report been made, DSS would not have investigated because "there's no medical documentation that this injury was non-accidental . . . [and] there's no disclosure by the people that were interviewed of any suspicion of neglect, any knowledge of neglect or abuse." However, Zimmerman's testimony does not completely negate Dr. Cooper's testimony to the contrary. The jury as the finder of fact is charged with weighing the evidence and deciding credibility. *See Smith v. Price*, 315 N.C. 523, 530-31, 340 S.E.2d 408, 413 (1986) (Explaining that as the finder of fact, the jury is "entitled to draw its own conclusions about the credibility of the witnesses and the weight to accord the evidence."). Moreover, the fact that there was competing testimony creates an issue of material fact for the jury to consider.

In sum, we find that plaintiffs forecasted sufficient evidence against defendant CFVMC to withstand summary judgment and that genuine issues of material fact exist with regard to the liability of this defendant.

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

B. Dr. Davis and Carolina Regional Radiology, P.A.

[2] Plaintiffs allege that Dr. Davis, being aware of the wrist fracture and having reported the 9th rib fracture on the first x-ray report on 16 April 2003, should have notified DSS of potential child abuse.³ Not only did she not notify DSS, she did not verbally inform any other physician or nurse about the suspicious findings. Dr. Ronald Friedman (“Dr. Friedman”) submitted an affidavit in which he stated, *inter alia*:

It is my opinion that the combination of wrist and rib fractures . . . which are recorded in radiology reports by Dr. Davis . . . and which are apparent on the X-Ray films of Ajamu Gaines, Jr. . . . are unusual and suspicious for a six-year-old pediatric patient. It is my opinion that the presence of those two fractures, in combination, were, and should have been to Dr. Davis under the applicable standard of care, indicative of potential non-accidental trauma . . . in a manner sufficient to have given Dr. Davis cause to suspect child abuse or child maltreatment

Dr. Friedman went on to say that the applicable standard of care required Dr. Davis to “not only note those findings on her radiology reports, but also to call, meet with, communicate with or otherwise highlight directly to the attending physician . . . the presence of a combination of radiological findings giving cause to suspect child abuse or child maltreatment”

Dr. Friedman also claimed that had Dr. Davis not breached the standard of care, authorities could have been notified “so that further investigation could have been conducted . . . to take steps to protect Ajamu Gaines, Jr. from a return to the dangerous residential environment where he subsequently suffered a massive head and brain injury” Dr. Friedman testified to this effect in his deposition. Again, Dr. Cooper testified as to the actions she believed, in her experience, DSS would have taken to remove Ajamu from the home.

In sum, we find that plaintiffs forecasted sufficient evidence against defendants Dr. Davis and Regional Radiology to withstand summary judgment and that genuine issues of material fact exist.

C. Dr. Tetzlaff

[3] Plaintiffs claim that Dr. Tetzlaff failed to review the first x-ray report, which would have made him aware of the old rib fracture, and failed to personally take a history of Ajamu.

3. Plaintiffs claim that Carolina Regional Radiology, P.A. is jointly and severally liable due to the negligent actions of its employee, Dr. Davis.

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

Dr. Randell Alexander (“Dr. Alexander”) submitted an affidavit stating, *inter alia*:

On April 15-16, 2003, Dr. Tetzlaff failed to properly analyze, appreciate, investigate, diagnose or properly document a discrepancy between the actual injury to Ajamu Gaines, Jr. . . . and the reported history of a fall from a porch, even though the noted fracture was not a compressional or “telescoping” type fracture which is the type of fracture normally associated with falls such as the one reported, and as a result he failed to undertake a full and proper investigation . . . of whether Ajamu Gaines, Jr. had been a victim of child abuse and/or was living in a dangerous residential environment from which he may need to be protected or removed to prevent foreseeable future harm[.]

Dr. Alexander also claimed that Dr. Tetzlaff breached the standard of care by failing to view the first x-ray report, which contained notice of the 9th rib fracture. He further stated: “It is my professional opinion that Dr. Tetzlaff’s deviations from the standard of care were a proximate cause of Ajamu Gaines, Jr.’s injuries.” While Dr. Alexander does not have experience working with DSS in order to know what DSS would have done, Dr. Cooper’s testimony on that point is competent. Dr. Alexander was deposed and testified to this effect, though at one point he indicated that the standard of care did not require Dr. Tetzlaff to view the first x-ray where the second x-ray was clear. This potential inconsistency does not render the testimony insufficient or void the affidavit; however, at trial such an inconsistent statement can be brought forward. *See Bost v. Riley*, 44 N.C. App. 638, 642, 262 S.E.2d 391, 393 (1980) (“Under our rules of evidence, prior inconsistent statements of a physician are admissible to impeach his testimony.”).

Dr. Cooper also testified that Dr. Tetzlaff and his team breached the standard of care. She stated that “the standard of care would have been for [Dr. Tetzlaff] to have read the [first] radiology report.” “Dr. Tetzlaff not knowing about the old rib fracture, I’m afraid was an untenable circumstance because he had the opportunity to know about the old rib fracture.” Additionally, Dr. Cooper was asked: “Is it your opinion that the standard of care required Dr. Tetzlaff who was called in for the purposes of a consult for aspiration pneumonia to again ask the mother and the child about the history of the injury?” She responded: “Yes. Because if you are a health care provider, for whatever reason you’re brought in to see the patient . . . you should

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

always . . . take a complete history” The record shows that Dr. Tetzlaff’s physician assistant did take a history, but plaintiffs allege that Dr. Tetzlaff breached the standard of care because he was not present when the history was taken, nor did he review or sign the history report.

In sum, we find that plaintiffs forecasted sufficient evidence against defendant Dr. Tetzlaff to withstand summary judgment and that genuine issues of material fact exist.

D. Dr. Jones and Cape Fear Orthopaedic Clinic, P.A.

[4] Plaintiffs allege that during the four follow-up visits with Dr. Jones there is no indication that Dr. Jones or any employee of Cape Fear Orthopaedic Clinic (1) obtained or reviewed the 16 April radiology report showing an old rib fracture; (2) documented physical signs of potential child abuse; (3) investigated further the “secondary diagnosis” from CFVMC that it was undetermined whether Ajamu’s wrist injury was accidental or purposely inflicted; (4) ordered a skeletal survey of Ajamu’s body; (5) consulted a forensic pediatrician with child abuse experience; or (6) questioned that Ajamu’s splint was in disrepair after “apparently [being] tripped” just a week after reportedly falling or jumping off a porch.⁴

Dr. Cooper did not testify as to the standard of care applicable to these defendants. Dr. Errol Mortimer (“Dr. Mortimer”) submitted an affidavit listing multiple breaches of the standard of care. At his deposition, Dr. Mortimer testified that, *inter alia*, Dr. Jones breached the standard of care because she failed to “[i]nform[] herself of the results of the [first] chest x-ray.” He stated: “It’s my opinion that if she did know of the results of that x-ray, then it would have been her responsibility to act on it, namely to contact a child protection serv-ice or the Department of Social Services or whoever the immediate party or parties are who assume responsibility for the investigation of a child who is suspected of having been neglected or abused.” He also claimed that the physician’s assistants were responsible “for being aware of the chest x-ray result.” While Dr. Mortimer admitted it would be speculation for him to state what DSS would have done, Dr. Cooper’s testimony is sufficient as to that issue.

4. Plaintiffs claim that Cape Fear Orthopaedic Clinic, P.A. is jointly and severally liable due to the negligent actions of its employee, Dr. Jones, and other healthcare personnel.

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

In her affidavit Nurse Yorker stated that, *inter alia*:

[T]he nurses and nursing staff at Cape Fear Orthopaedic Clinic failed to properly evaluate and assess the physical condition, medical history and all relevant circumstances pertaining to Ajamu Gaines, Jr., even after he had an X-Ray report showing an old fracture . . . and even after [he] presented with a history of being “tripped” only a week after his prior visit to Cape Fear Valley Medical Center, and/or failed to bring to the attention of the physicians or other health care providers at Cape Fear Orthopaedic Clinic the need for such a full and complete evaluation of Ajamu Gaines, Jr.[]

She claimed that the multiple breaches of the standard of care “were a direct and proximate cause of Ajamu Gaines, Jr.’s injuries.”

In sum, we find that plaintiffs forecasted sufficient evidence against Dr. Jones and Cape Fear Orthopaedic Clinic to withstand summary judgment and that genuine issues of material fact exist.

IV. Application of the Evidence

[5] Defendants claim that the expert testimony in this case is speculative and that proximate cause is based on a series of unsubstantiated inferences; however, “[c]ausation is an inference of fact to be drawn from other facts and circumstances.” *Turner*, 325 N.C. at 162, 381 S.E.2d at 712. In reviewing the whole record, we find that the evidence in this case is based on facts, i.e., the documented medical records and the experts’ specific knowledge regarding the standard of care and proximate cause. At trial, the jury will determine whether defendants’ actions constituted a breach of the standard of care and proximately caused Ajamu’s injury. At the summary judgment stage, we must view the evidence in the light most favorable to plaintiffs, and in so doing, we find that plaintiffs forecasted sufficient evidence to withstand summary judgment.

A key fact in this case, which bolsters plaintiffs’ proximate cause argument, is that Kegler had an outstanding warrant against him in April 2003 and was living under a false name. As plaintiffs argue, had the physicians properly recognized the suspicious nature of Ajamu’s wrist injury, coupled with the old rib fracture, DSS would have been notified and would likely have had a background check run on Kegler. Dr. Cooper testified in support of this argument, stating that “the sheriff’s department is typically notified at the same time DSS finds out about a possible child abuse case” and a background check is run.

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

In July 2003, the background check revealed the outstanding warrant against Kegler.

While there is no case law on point in North Carolina, defendants cite to the case of *Chapa v. United States*, 497 F.3d 883 (8th Cir. 2007), which actually supports plaintiffs' claims. In *Chapa*, the minor child, Dakota, was treated at Ehrling Bergquist Hospital (the "Hospital") on six occasions between his birth on 3 August 2001 and 2 December 2001. *Id.* at 885.

On September 25, 2001, Dakota's parents brought him to the emergency department at Bergquist after his mother accidentally gave him a ten-fold overdose of Sudafed. Dr. Lyle J. Vander-Schaaf called the poison control center, observed Dakota for two hours, and released him to his parents. On October 5, 2001, Dakota's parents took him for a routine, well-baby check-up. Nurse Practitioner Lynn Murphy inquired as to the cause of a small bruise on Dakota's forehead. His parents stated that most likely a toddler at Dakota's daycare inflicted the bruise. On October 12, 2001, Dakota's father brought him to the emergency department, claiming that he had jerked Dakota by the left arm while trying to lift him. Dr. Garri diagnosed Dakota with "nurse-maid's elbow." Dakota's father told Dr. Garri that Dakota had no medical history, and Dr. Garri did not request Dakota's medical records. After an x-ray of Dakota's left arm did not detect any fractures, Dr. Garri released Dakota to his father.

Id. at 885-86. On 2 December 2001, Dakota was again brought to the hospital and was diagnosed with "'shaken-baby syndrome,'" and subsequently with "severe permanent brain damage, blindness and seizures." *Id.* at 886.

During a bench trial, Dr. John A. Tilelli, the Chapas' expert medical witness, testified that, in his opinion, the care provided during all three of Dakota's visits to Bergquist before the December 2, 2001 incident fell below the generally recognized medical standard of care. Specifically, with respect to the treatment by Dr. Garri, Dr. Tilelli testified that all medical practitioners have a duty to review all medical data available to them, and Dr. Garri deviated from this medical standard of care.

Id. The district court found that the medical personnel of the hospital complied with the standard of care, but that Dr. Garri, the treating physician, did not comply with the standard of care because he

GAINES v. CUMBERLAND CNTY. HOSP. SYS., INC.

[203 N.C. App. 213 (2010)]

failed to review Dakota's medical records. *Id.* at 887. "Given the ready accessibility of the records and the nature of the injury for which Dr. Garri treated Dakota [in October 2001], the district court found that Dr. Garri deviated from the medical standard of care in that respect." *Id.* However, the court found that there was insufficient evidence to prove that Dr. Garri's failure to review the medical records, and report the October 2001 incident, proximately caused the December 2001 injury. *Id.* at 889. The 8th Circuit Court of Appeals upheld the lower court and stated,

While Dr. Tilelli did testify about what he believed was more likely than not the proximate cause of Dakota's injuries, he never worked with Family Advocacy and was not an expert on Family Advocacy's policies and procedures. Without any competent testimony about how Family Advocacy would have responded to a situation similar to Dakota's, the district court correctly held that there was only "wishful speculation" as to whether Dakota's injuries would have been prevented had Dr. Garri contacted Family Advocacy.

Id. at 890. Therefore, even though Dr. Garri breached the standard of care, and an expert testified regarding proximate cause, that expert could not say what Family Advocacy would or would not have done had Dr. Garri made the report. *Id.* The indication in *Chapa* is, thus, that summary judgment for defendants would have been reversed had plaintiffs provided any expert evidence of what Family Advocacy would have done had Dr. Garri reported the October 2001 incident.

Here, Dr. Cooper testified as to what DSS would have done had a report been made in April 2003. Dr. Cooper is qualified to testify about the actions of DSS due to her long-standing relationship with DSS and expertise about their policies. Other physicians testified regarding the standard of care and proximate cause, but their testimony only substantiates plaintiffs' claims to the point where DSS is actually contacted. Nevertheless, Dr. Cooper's testimony about what DSS would have done, though contradicted by Zimmerman, forecasts sufficient evidence at the summary judgment stage and creates an issue of material fact for jury consideration.

V. Conclusion

In sum, viewing the evidence in the light most favorable to plaintiffs, there are genuine issues of material fact in dispute such that summary judgment was improperly granted for defendants. Thus, we

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

reverse the grant of summary judgment by the trial court and remand for further proceedings.

Reverse and Remand.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. RAJOHN ALMANN CRUZ

No. COA09-386

(Filed 6 April 2010)

Homicide— imperfect self-defense—instruction refused

The trial court did not err by refusing to instruct the jury on voluntary manslaughter under a theory of imperfect self-defense where there was no evidence that defendant believed it necessary to kill the decedent in order to save himself from death or great bodily harm. The evidence clearly indicates that defendant initiated a fight, defendant was determined to win the fight, and defendant fired his gun in order to get away.

Judge ROBERT N. HUNTER, JR. dissenting.

Appeal by Defendant from judgments entered 29 May 2008 by Judge Stafford G. Bullock in Robeson County Superior Court. Heard in the Court of Appeals 17 September 2009.

Duncan B. McCormick for Defendant-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

STEPHENS, Judge.

Rajohn Almann Cruz (“Defendant”) appeals as a matter of right from his convictions for second-degree murder and assault with a deadly weapon inflicting serious injury.¹ On appeal, Defendant argues that the trial court erred when it refused his request for a jury instruction of voluntary manslaughter based on imperfect self-defense. After

1. Although Defendant gave notice of appeal from both judgments, Defendant’s argument on appeal pertains solely to his conviction for second-degree murder.

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

review, we conclude that Defendant's evidence was insufficient to warrant a jury instruction on voluntary manslaughter based on imperfect self-defense, and thus uphold the judgments of the trial court.

I. Factual Background and Procedural History

On 12 September 2005, Defendant was charged in a bill of indictment with first-degree murder, assault with a deadly weapon inflicting serious injury, and robbery with a dangerous weapon. He entered a plea of not guilty to all charges and was tried before a jury on 19 May 2008.

At trial, the State's evidence tended to show the following: Santiago Aquino Rivera ("Santiago") shared apartment A at 1004 Willow Street with Ignacio Tolentino ("Ignacio"), Julio Tolentino ("Julio"), and Renaut Lara Rayon ("Renaut"). Renaut's wife and Julio's wife and child also lived at the Willow Street apartment. Jorge Tolentino Santiago ("Jorge") and Raul Galvan Rivera ("Raul"), along with two other men, lived in apartment B of the Willow Street apartment.

On 7 May 2005 at about 7:00 a.m., Ignacio was sitting on his apartment porch when he saw Defendant running toward him with a gun. Upon noticing Defendant, Ignacio ran into the apartment and attempted to shut the door, but Defendant pushed the door open and went inside. Defendant demanded money, and Ignacio complied. Defendant demanded more money from Santiago who was then asleep on the couch in the living room. Defendant shot Santiago in the chest after Santiago told Defendant that he did not have any money. After shooting Santiago, Defendant shot Ignacio in the knee and beat him with the gun. Ignacio kicked Defendant in the stomach as Defendant attempted to search through Ignacio's pockets. During the scuffle, Ignacio knocked the gun out of Defendant's hand, but Defendant was able to retrieve the gun and pull the trigger; however, the gun did not fire.

While Defendant and Ignacio were fighting, Santiago walked down the hallway to the bedroom where Renaut and Julio were sleeping, whereupon he told Julio that Defendant was hitting his brother. Julio called the police, locked the apartment door to prevent Defendant from leaving. Defendant continued to beat Ignacio with the gun and the two men fought until Julio entered the room and began fighting also. Julio beat Defendant with the telephone while waiting for the police to arrive. Renaut retrieved a shotgun and

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

pointed it at Defendant. Defendant then let go of Ignacio. Renaut cocked the gun and Defendant begged Renaut not to shoot him.

Julio unlocked the door and looked outside to see if anyone had come with Defendant, at which point Defendant attempted to run out of the apartment. Julio pulled Defendant into the yard and Renaut picked up a piece of wood and hit Defendant. Ignacio, Renaut, Julio, Jorge, and at least one other unnamed man beat Defendant and prevented him from leaving. During the fight, Jorge took Ignacio's money from Defendant's hand.

When the officer arrived at the scene, the officer saw Defendant running away from the apartment. The officer ran toward Defendant, and Defendant refused to stop when the officer requested him to do so. Defendant stopped when the officer caught up to Defendant and repeated the order to stop. The officer called EMS after noticing that Defendant and the other men at the scene were bleeding. Defendant told the officer that he had been shot in the head; however, he only suffered a laceration over his right eye and a laceration to the back of his head. Santiago died at the scene from a gunshot wound to his heart.

Defendant's evidence tended to show the following: On 7 May 2005, at approximately 7:00 a.m., Defendant was walking on the street near Santiago and Ignacio's apartment building. As Defendant neared the corner, Santiago and Ignacio began to point at him, and one of the men came out into the yard and began to argue with Defendant. In order to defend himself, Defendant swung and tried to hit the man that approached him. Defendant testified that he fought with the man in the yard, on the porch, and in the doorway of the apartment.

While the men were fighting, someone hit Defendant with an unknown object in the back of the head. The blow to the head caused Defendant to close his eyes and left him dizzy. After being hit in the head, Defendant put his hand on his pistol but did not pull the gun out of his pocket. When Defendant opened his eyes, he saw a man holding and pointing a shotgun at his head. At this point, Defendant, thinking that he was going to be shot, closed his eyes and listened to the gun click as the man pulled the trigger. The gun did not fire. Defendant, in an attempt to get away from the men, pulled his pistol and fired a shot at the man holding the shotgun but was unsure whether he shot anyone. As Defendant attempted to leave the apartment, someone held Defendant and kicked him, whereupon Defendant fired another shot at the ground. The second shot hit the man who was holding Defendant in his leg.

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

After Defendant shot both men, he ran from the apartment but was hit in the face with a two-by-four stick by one of the other men living at the apartment. Defendant hit this man with his pistol, breaking it into two pieces. The two men continued to hold and beat Defendant until the police arrived. Defendant ran toward the police officer and complied with the officer's instructions to stop and sit down. Defendant denies robbing or attempting to rob the men at the apartment.

During the jury instruction conference, the following exchange took place between defense counsel, Mr. Foxworth, and the trial judge:

MR. FOXWORTH: You're going to charge on the self-defense?

THE COURT: I'm going to charge self-defense, but the self-defense that I'm going to be charging is going to only apply to premeditation and deliberation and second degree. It's not going to apply to felony murder, robbery or the felonious assault.

MR. FOXWORTH: And you'll give that[?]

THE COURT: Which one do you want me to give?

MR. FOXWORTH: The imperfect language is in the voluntary manslaughter.

THE COURT: No, sir, I'm not going to [give] involuntary [sic] manslaughter. It's going to be first degree murder by way of felony murder, premeditation and deliberation, or second degree murder or not guilty.

. . . .

MR. FOXWORTH: You're not going to instruct on self-defense, perfect and imperfect?

THE COURT: No, if you want me to do self-defense, it's going to be based on premeditation-deliberation or second degree.

MR. FOXWORTH: I understand that.

. . . .

THE COURT: What self-defense instruction do you want me to give?

MR. FOXWORTH: Perfect and imperfect.

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

THE COURT: Number?

MR. FOXWORTH: 308.45.

THE COURT: That's the one I'll give.

MR. FOXWORTH: And the imperfect language is in the voluntary manslaughter because if they find imperfect, that's what he [sic] must find is voluntary if you find imperfect.

THE COURT: Which one of the instructions do you want me to give on self-defense?

MR. FOXWORTH: Which instruction?

THE COURT: Yes.

MR. FOXWORTH: I want you to give 308.45, which is perfect self-defense, but that's all it speaks of. It doesn't speak of imperfect, but I also am requesting the Court to give imperfect self-defense, which you said you were going to give.

THE COURT: Can you have imperfect self-defense in first degree murder?

MR. FOXWORTH: Yes, sir, I think you can.

THE COURT: I thought you just said that it relates to voluntary manslaughter?

MR. FOXWORTH: Well, it says if they find imperfect self-defense, then the courts have said then that's what the verdict has to be, voluntary manslaughter.

THE COURT: I'm going to give 308.45.

MR. FOXWORTH: So, you won't give imperfect self-defense?

THE COURT: I'm going to give 308.45 as it lends itself to premeditation-deliberation and second degree. I don't think you're entitled to it, but out of an abundance of caution I'm going to give it.

MR. FOXWORTH: But not imperfect.

THE COURT: Is that word there something you didn't quite understand?

MR. FOXWORTH: All right. But we'd just like the Court to note the exception.

THE COURT: Exception noted.

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

As shown in the transcript, the court noted that a self-defense instruction would be given with regard to the first-degree murder charge and second-degree murder charge only “out of an abundance of caution.” At the jury instruction conference, the trial judge denied Defendant’s request to instruct on voluntary manslaughter based on the law of imperfect self-defense as it applies to second-degree murder.

Defendant was found not guilty of robbery with a firearm, but guilty of second-degree murder and assault with a deadly weapon inflicting serious injury. On 29 May 2008, the trial court imposed an active term of imprisonment of 189 to 236 months for second-degree murder and a consecutive active term of 29 to 44 months imprisonment for assault with a deadly weapon inflicting serious injury. Defendant gave notice of appeal in open court.

II. Voluntary Manslaughter Under a Theory of Imperfect Self-Defense

Defendant argues that the trial court erred in denying his request to instruct the jury on voluntary manslaughter based on imperfect self-defense. We disagree.

Our Court reviews a trial court’s decisions regarding jury instructions *de novo*. *State v. Osorio*, — N.C. App. —, —, 675 S.E.2d 144, 149 (2009). The trial court must instruct the jury on self-defense “if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for [defendant] to kill his adversary in order to protect himself from death or great bodily harm.” *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). Moreover, the trial court must provide a self-defense instruction if the above criteria is met “even though there is contradictory evidence by the State or discrepancies in the defendant’s evidence.” *State v. Revels*, — N.C. App. —, —, 673 S.E.2d 677, 680, *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204 (2009). With regard to whether a defendant is entitled to a jury instruction on self-defense, the trial court must consider the admissible evidence in the light most favorable to the defendant. *State v. Hughes*, 82 N.C. App. 724, 727, 348 S.E.2d 147, 150 (1986).

[B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

Bush, 307 N.C. at 160-61, 297 S.E.2d at 569.

In the case at bar, the trial court instructed the jury on perfect self-defense, but refused to provide an instruction on imperfect self-defense. A defendant acts in perfect self-defense when the following four elements are present at the time of the killing:

- (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
- (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
- (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
- (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

Revels, — N.C. App. at —, 673 S.E.2d at 681 (internal citation and quotation marks omitted). An instruction on imperfect self-defense should be given where a defendant "reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so *without* murderous intent, and (2) might have used excessive force." *State v. Mize*, 316 N.C. 48, 52, 340 S.E.2d 439, 441-42 (1986). Where there is no evidence supporting a lesser included offense, it is error for the trial court to instruct the jury on such. *See State v. Ray*, 299 N.C. 151, 163, 261 S.E.2d 789, 797 (1980) ("It is clear then that it is error for the trial court to submit as an alternative verdict a lesser included offense which is not actually supported by any evidence in the case.").

In *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995), our Supreme Court held that the defendant was not entitled to an instruction on voluntary manslaughter under a theory of imperfect self-defense where the evidence did "not tend to indicate that the de-

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

defendant in fact formed a belief that it was necessary to kill the deceased, thereby entitling defendant to an instruction on imperfect self-defense.” *Id.* at 663, 459 S.E.2d at 779. In *Lyons*, the defendant testified that he was afraid someone was breaking into his apartment when he heard the police banging on his door. *Id.* at 656, 459 S.E.2d at 775. The defendant testified that he decided to fire a “warning shot,” and that he later found out that the shot had struck and killed a police officer. *Id.* On appeal, the defendant argued that the trial court erred by refusing to instruct the jury on the theories of perfect and imperfect self-defense and voluntary manslaughter, *inter alia*. *Id.* at 661, 459 S.E.2d at 778. In upholding the judgments of the trial court, our Supreme Court held

that the evidence, taken in the light most favorable to the defendant, does not tend to show that the defendant had formed a reasonable belief that it was necessary to kill the person inside his doorway in order to save himself from death or great bodily harm; and therefore, he was not entitled to an instruction on self-defense. The defendant’s evidence, considered in the light most favorable to him, tended to show that when he heard the blows on his door, he was scared and thought he was being robbed again. Defendant testified he only pulled the trigger of his .38-caliber revolver “to shoot a warning shot hoping these people would run.” Defendant also testified that he “didn’t intend to shoot anybody” and that his “intent was to shoot at the top of the door.” Thus, from defendant’s own testimony regarding his thinking at the critical time, it is clear he meant to scare or warn and did not intend to shoot anyone. There is absolutely no evidence in the record that defendant had formed a belief that it was necessary to kill in order to save himself from death or great bodily harm. *See State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789 (1994) (the first requirement of self-defense, that defendant believed it necessary to kill the deceased, is not present where defendant contended he never aimed a gun at anyone and shot only at the floor). Further, defendant’s self-serving statement that he was “scared” is not evidence that defendant formed a belief that it was necessary to kill in order to save himself. *See Bush*, 307 N.C. at 159-60, 297 S.E.2d at 568 (defendant’s testimony that he was “afraid” and “scared” only indicates a vague and unspecified fear or nervousness and is not evidence that defendant subjectively believed it was necessary to kill in order to protect himself from death or great bodily harm). Because no evi-

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

dence demonstrates or indicates defendant believed it necessary to kill to protect himself from death or great bodily harm, defendant was not entitled to an instruction on either perfect or imperfect self-defense. *State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 12 (1989).

Id. at 662-63, 459 S.E.2d at 778-79.

In the present case and as in *Lyons*, there is no evidence that Defendant believed it necessary to kill Santiago in order to save himself from death or great bodily harm. By Defendant's own testimony, Defendant was not in fear for his life when he fired his gun. Defendant described the shooting as follows:

The guy ended up laying on the floor, and I was over him hitting him as he was swinging back, too. Somebody hit me in the back of the head with something. I still don't know where it—what it was to today, and I ended up that time putting my hand on a pistol I had in the back of my pocket. So, when I looked up there's a guy standing in front of me with a shotgun. So, I—the first thing I do I look at his hands to see what his hand's doing, I see his finger moving back so I closed my eyes thinking I was going to get shot. So, I heard a click where the back of the—where he pulled the trigger and the hammer hitting the back of the gun, but no bullet comes out. So, I pulls out my pistol and I fires and begins to run to get out the door, but as I take the step, the guy that I was on was holding onto me, and he was kicking up at me so I fired.

Defense counsel asked Defendant what he was trying to do when he fired his pistol, and Defendant responded, "Just get away and get them off of me." Defense counsel continued with direct examination and asked Defendant if he knew that he had hit anyone when he fired his pistol. Defendant replied, "No, sir. I didn't really try to see. I was just trying to turn and get away then. You know, I just fired a shot trying to hope they'd get off of me really with my eyes closed not even really looking at what I'm firing at."

On cross-examination by the State, Defendant described how the fight began and how it progressed leading up to the shooting. The following exchange took place:

[THE STATE]. All right. Before [one of the men] got to the doorway, you started this fight on the curb, you said?

[DEFENDANT]. Yes, sir.

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

[THE STATE]. You went through his yard?

[DEFENDANT]. Yeah, we were fighting through the yard.

[THE STATE]. That means you're going forward; he's going backwards?

[DEFENDANT]. No, we're both fighting. He hitting me and I'm hitting him. He might be trying to dodge a punch; I might be trying to dodge a punch. We're just going through a little fight all through the yard.

[THE STATE]. Well, he starts—

[DEFENDANT]. But he's at the time like—he done hit me, you know what I'm saying, and we're in a fight, and in my mind I'm like I'm gonna get him; I'm not going to let him get away. I don't know what's gonna get on.

[THE STATE]. You're not even going to let him get away if he gets back into his own house, right?

. . . .

[DEFENDANT]. Well, right then, no, I was just thinking about fighting.

[THE STATE]. You weren't going to let him get away, even into his own house, yes or no?

[DEFENDANT]. Well, at the time I was fighting. I wasn't thinking about him getting away.

[THE STATE]. Yes or no?

[DEFENDANT]. No.

[THE STATE]. Thank you.

THE COURT: Now you may explain your answer. Once you answer yes or no, you may give an explanation if there is one.

[DEFENDANT]: See, I was in the midst of fighting so I was trying to not let the man get away and go get nothing. I was commenced to beating his butt. He had done hit me, and we was in the commenced to fighting.

Defendant further testified on cross-examination that when he fired the gun, he was not aiming anywhere specific, but that he was simply

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

trying to get away. Defendant testified, “I didn’t look down and point the gun. I just fired a shot with my head still up looking trying to get out the door. I didn’t look at what I was shooting at.”

There is no evidence that Defendant fired his gun because he feared for his life. Indeed, had he fired his gun because he believed it necessary to protect himself from death or great bodily harm, he would have taken aim at the source of such likely harm, rather than, as he testified, shooting blindly while trying to get out the door. The evidence clearly indicates that Defendant initiated a fight, that Defendant was determined to win that fight, and that Defendant fired his gun in order to get away. There is no evidence that Defendant believed he was in danger of death or great bodily harm if he was unable to get away from the fight. *See Revels*, — N.C. App. at —, 673 S.E.2d at 681. Further, it appears that the trial court did not think there was any evidence that Defendant believed he needed to fire his gun in order to save himself from death or great bodily harm. *See id.* On the contrary, the trial court explained that it was giving the self-defense charge “out of an abundance of caution” in an effort to avoid having to retry this matter.

The question of whether the trial court erred in instructing the jury on the law of self-defense as it related to the charges of first-degree and second-degree murder is not before us and, in any event, any such error would have been to Defendant’s benefit. On the issue that is before us—whether the court erred in refusing to instruct the jury on voluntary manslaughter under a theory of imperfect self-defense—we find no error.

NO ERROR.

Judge BEASLEY concurs.

Judge HUNTER, JR. dissents in a separate opinion.

HUNTER, JR., Robert N., Judge, dissenting:

On 7 May 2005, defendant was involved in an altercation with six men, including Ignacio Tolentino (“Ignacio”) and Santiago Aquino Rivera (“Santiago”). The altercation took place in part inside the home of Ignacio and Santiago. The following additional evidence, not all of which is included in the majority’s opinion, describing this altercation informs my decision to dissent.

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

The relevant State's evidence on the issue of self-defense is as follows: While defendant and Ignacio were fighting, Santiago walked down the hallway to the bedroom where Renaut and Julio were sleeping, whereupon he told Julio that defendant was hitting his brother. Julio called the police, locked the apartment door to prevent defendant from leaving, and beat defendant with the telephone while waiting for the police to arrive. Renaut retrieved a shotgun and pointed it at defendant. Defendant then let go of Ignacio. Renaut cocked the gun and defendant begged Renaut not to shoot him, stating, "Dear God, do not kill me." Julio unlocked the door and looked outside to see if anyone had come with defendant, at which point defendant attempted to run out of the apartment.

Defendant's evidence tended to show the following: On 7 May 2005, at approximately 7:00 a.m., defendant was walking on the street near Santiago and Ignacio's apartment building. As defendant neared the corner, Santiago and Ignacio began to point at him, and one of the men came out into the yard and began to argue with defendant. In order to defend himself, defendant swung and tried to hit the man that approached him. Defendant testified that he fought with the man in the yard, on the porch, and in the doorway of the apartment.

While the men were fighting, someone hit defendant with an unknown object in the back of the head. The blow to the head caused defendant to close his eyes and left him dizzy. After being hit in the head, defendant put his hand on his pistol but did not pull the gun out of his pocket. When defendant opened his eyes, he saw a man holding and pointing a shotgun at his head. At this point, defendant, thinking that he was going to be shot, closed his eyes and listened to the gun click as the man pulled the trigger. The gun did not fire. Defendant, in an attempt to get away from the men, pulled his pistol and fired a shot at the man holding the shotgun but was unsure whether he shot anyone. As defendant attempted to leave the apartment, someone held defendant and kicked him, whereupon defendant fired another shot at the ground. The second shot hit the man in his leg who was holding defendant.

After defendant shot both men, he ran from the apartment but was hit in the face with a two-by-four stick by one of the other men living at the apartment. Defendant hit this man with his pistol, breaking it into two pieces. The two men continued to hold and beat defendant until the police arrived. Defendant ran toward the police officer and complied with the officer's instructions to stop and sit

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

down. Defendant denies robbing or attempting to rob the men at the apartment.

Based upon this evidence and the evidence cited in the majority opinion the trial court decided to give the perfect self-defense instruction. This decision, although reluctantly made by the trial court, was unchallenged by the State at trial and was not appealed. I do not question the correctness of the trial court's decision to grant the self-defense instruction. However, I do question the trial court's subsequent decisions implementing the consequences of the decision to instruct on perfect self-defense, once that decision had been made. Once a trial court decides that there is sufficient evidence to give the perfect self-defense instruction, it seems to me that the imperfect self-defense instruction should also be given pursuant to a duty under law and as a logical consequence of this initial decision. This duty has been recognized in our state by the leading commentators and our courts. *See State v. Best*, 79 N.C. App. 734, 737, 340 S.E.2d 524, 527 (1986), *overruled on other grounds*, *State v. Maynor*, 331 N.C. 695, 417 S.E.2d 453 (1992); *State v. Rummage*, 280 N.C. 51, 58, 185 S.E.2d 221, 226 (1971); *see also* JOHN RUBIN, *THE LAW OF SELF-DEFENSE IN NORTH CAROLINA* 192 (Institute of Government, University of North Carolina at Chapel Hill 1996).

Whether evidence is sufficient to warrant an instruction on self-defense is a question of law; therefore, the applicable standard of review is *de novo*. *State v. Lyons*, 340 N.C. 646, 662-63, 459 S.E.2d 770, 778-79 (1995). The trial court must instruct the jury on self-defense "if there is *any evidence* in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for [defendant] to kill his adversary in order to protect himself from death or great bodily harm." *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982) (emphasis added) (citing *State v. Spaulding*, 298 N.C. 149, 156, 257 S.E.2d 391, 395 (1979)), *aff'd*, 826 F.2d 1059 (1987). Moreover, the trial court must provide a self-defense instruction if the above criteria is met "even though there is contradictory evidence by the State or discrepancies in the defendant's evidence." *State v. Revels*, — N.C. App. —, —, 673 S.E.2d 677, 680 (citing *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 819 (1974)), *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204 (2009). With regard to whether defendant is entitled to a jury instruction on self-defense, the trial court must consider the admissible evidence in the light most favorable to the defendant. *State v. Hughes*, 82 N.C. App. 724, 727, 348 S.E.2d 147, 150 (1986).

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

In the case at bar, the trial court instructed the jury on perfect self-defense, but refused to provide an instruction on imperfect self-defense. A defendant acts in perfect self-defense when the following four elements are present at the time of the killing:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm."

Revels, — N.C. App. at —, 673 S.E.2d at 681 (citation omitted). An instruction on imperfect self-defense should be given where a defendant "reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so *without* murderous intent, and (2) might have used excessive force." *State v. Mize*, 316 N.C. 48, 52, 340 S.E.2d 439, 442-43 (1986). The doctrine of imperfect self-defense encompasses the first two elements of perfect self-defense; therefore, in a homicide case where there is sufficient evidence to warrant instructions on perfect self-defense, the trial court must also instruct on imperfect self-defense. *See Best*, 79 N.C. App. at 737, 340 S.E.2d at 527 (explaining "[i]t is difficult to imagine a homicide case in which the evidence supports an instruction on self defense but not an instruction on voluntary manslaughter based upon an excessive force theory"). In the present case, because the court instructed the jury on perfect self-defense, the evidence must have been sufficient to warrant an instruction on imperfect self-defense. *See id.*

Viewing the evidence on record pursuant to the *any evidence* standard articulated in *Bush*, I would hold that the trial court erred in failing to instruct the jury on imperfect self-defense. *See Bush*, 307 N.C. at 160, 297 S.E.2d at 569.

STATE v. CRUZ

[203 N.C. App. 230 (2010)]

A killing based on imperfect self-defense “is both unlawful and intentional, [however] the circumstances themselves are said to displace malice and to reduce the offense from murder to manslaughter.” *State v. Herndon*, 177 N.C. App. 353, 362, 629 S.E.2d 170, 176 (quoting *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978)), *disc. review denied, appeal dismissed*, 360 N.C. 539, 634 S.E.2d 542 (2006). “ ‘[V]oluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor.’ ” *Lyons*, 340 N.C. at 663, 459 S.E.2d at 779 (quoting *State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 553 (1983)).

Where a lesser included offense is supported by the evidence, the trial court must instruct the jury on that offense. “ ‘[T]he failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense.’ ” *State v. Bumgarner*, 147 N.C. App. 409, 417, 556 S.E.2d 324, 330 (2001) (citation omitted). In *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981), our Supreme Court noted that “[t]he sole factor determining the judge’s obligation to give such [a lesser included] instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.” This Court considers the admissible facts in the light most favorable to the defendant when determining whether defendant is entitled to a jury instruction on voluntary manslaughter based on imperfect self-defense. *State v. Coley*, 193 N.C. App. 458, 467, 668 S.E.2d 46, 53 (2008), *aff’d*, 363 N.C. 622, 683 S.E.2d 208 (2009).

Weighing the totality of all the evidence as required by our case law and for the reasons stated above, I would find the trial court’s failure to give the imperfect self-defense jury instruction requested by the defendant to be a prejudicial error and therefore dissent from the majority opinion.

MACE v. PYATT

[203 N.C. App. 245 (2010)]

BRENDA JANE MACE, PLAINTIFF v. MONTY PYATT, CHARLES CAMERON FLACK,
AND WADE E. FLACK, DEFENDANTS

No. COA09-569

(Filed 6 April 2010)

1. Damages and Remedies— compensatory damages—punitive damages—willful and wanton conduct

Although the trial court did not err by denying defendant's motion for directed verdict and judgment notwithstanding the verdict on the issues of conspiracy and conversion, defendant was entitled to a partial new trial on the amount of compensatory damages. However, there was no error in submitting the issue of punitive damages to the jury since plaintiff proved the aggravating factor of willful and wanton conduct.

2. Jury— submission of issues—abuse of discretion standard

The trial court did not err by submitting the second, fifth, and eighth issues to the jury in a conspiracy and conversion case. No evidence in the record showed that the trial court abused its discretion by submitting these questions to the jury.

3. Appeal and Error— preservation of issues—failure to object

Although defendant objected to a portion of the jury charge at trial in a conspiracy and conversion case, defendant failed to preserve this issue for review based on his failure to object despite being given two opportunities to do so.

Appeal by defendant Charles Cameron Flack from judgment and orders entered 16 October 2008 and 12 November 2008 *nunc pro tunc* 16 October 2008 by Judge James U. Downs in Rutherford County Superior Court. Heard in the Court of Appeals 28 October 2009.

Marvin Sparrow; and Kathryn VandenBerg for plaintiff-appellee.

Prince, Youngblood & Massagee, PLLC, by Sharon B. Alexander, for defendant-appellant.

MACE v. PYATT

[203 N.C. App. 245 (2010)]

HUNTER, JR., Robert N., Judge.

Charles Flack (“defendant”)¹ appeals from the decision of the trial court to enter judgment and deny his motion for directed verdict or judgment notwithstanding the verdict on the issues of conspiracy, conversion, compensatory damages, and punitive damages. A jury awarded Brenda Mace (“plaintiff”) compensatory damages for conversion without the benefit of any evidence from plaintiff establishing the value of the property converted. Based upon our case law requiring proof of compensatory damages, we reverse for a partial new trial on this issue. We find no error in the jury’s punitive damages award against defendant and Monty Pyatt (“Pyatt”) based upon plaintiff’s claims for fraud, forgery, trespass, and conversion.² We also affirm the trial court’s order setting aside the defective deeds, and lowering the punitive damages award to \$250,000 to conform with N.C. Gen. Stat. § 1D-25 (2007). Because the evidence was sufficient to take all these issues to the jury except the compensatory damages issue, we find no error in part and grant a partial new trial on the issue of compensatory damages.

BACKGROUND

The evidence presented at trial tended to show the following. In August 2002, plaintiff owned 12 acres of land on Cedar Creek Road, Lake Lure, Rutherford County, North Carolina (the “Cedar Creek Property”). A single house trailer containing plaintiff’s household property was located on the Cedar Creek Property. In October 2002, plaintiff suffered a severe car accident requiring an extensive recovery period, which necessitated her staying with friends until she made plans to move back to the property in the fall of 2003. During the interim, plaintiff’s son periodically lived on the property until he moved out in October 2003. During the entire time of plaintiff’s recuperation, plaintiff visited her trailer about once a week in order to retrieve her mail and check on the property.

Between October and December 2003, in order to raise money to move back into the trailer, plaintiff asked Earl Lytle to fell and sell

1. No damages were awarded against Wade Flack in the jury verdict, and plaintiff’s complaint shows that he was joined in the action only as a necessary party due to his alleged ownership interest in plaintiff’s real estate. Defendant’s brief on appeal does not challenge the trial court’s order setting aside the deed granting Wade Flack his supposed interest in plaintiff’s land.

2. The record shows that default judgment was entered against Pyatt due to his failure to file a responsive pleading or appear in court after being properly served. Pyatt is accordingly not a party in the current appeal.

MACE v. PYATT

[203 N.C. App. 245 (2010)]

several trees from the Cedar Creek Property. After visiting the property to locate the timber, Mr. Lytle notified plaintiff that there was a “problem.” Plaintiff drove to the property to investigate, and observed a camper parked next to her trailer.

At the Rutherford County Register of Deeds Office, plaintiff’s research uncovered a paper writing recorded on 20 May 2003 purporting to transfer her interest in the Cedar Creek Property to Pyatt for the sum of \$1.00. Pyatt lived across the street from the Cedar Creek Property with his parents.

Plaintiff also discovered a chain of deeds, following the 20 May 2003 deed, purportedly transferring her property. On 2 June 2003, a deed was signed transferring Pyatt’s alleged interest in the Cedar Creek Property to defendant. On 15 October 2003, defendant signed a deed transferring his purported interest to Raul and Sonja McFaddin. The deeds from Pyatt to defendant and from defendant to the McFaddins were recorded on 20 November 2003. Defendant testified that he received \$50,000 on the sale of the Cedar Creek Property to the McFaddins.

In January 2004, plaintiff returned to the Cedar Creek Property, and found a gate blocking her entrance to the land. Plaintiff noticed that the McFaddins’ camper was still on the property, but that her trailer had been removed from its foundation, and relocated about 200 feet to a field next to a nearby creek. Most of plaintiff’s personal items and furniture were ripped apart, strewn about the grounds, and left exposed to the elements. Several household appliances were missing altogether, including plaintiff’s refrigerator and stove. The trailer’s windows, doors, and exterior were destroyed, and water damage existed throughout the home. Inside the trailer, the carpet was torn away from the floor, wires were pulled and left dangling from the ceiling, light fixtures and ceiling fans were dislocated, and the furnace was dislodged and ruined. Items from inside plaintiff’s separate storage building were also vandalized and left to the elements. While on the property, plaintiff took pictures of the damage. Several days later, plaintiff returned to the Cedar Creek Property, and discovered that the trailer and all her possessions had been removed. At trial, plaintiff testified that she had not seen or recovered either her trailer or personal property.

Carl Ledford, plaintiff’s neighbor and Pyatt’s stepfather, testified at trial. Mr. Ledford stated that sometime after plaintiff’s ex-husband died in May 2003, he noticed some activity on the Cedar Creek

MACE v. PYATT

[203 N.C. App. 245 (2010)]

Property. When Mr. Ledford walked over to investigate, he saw Pyatt and defendant standing by plaintiff's trailer. Mr. Ledford recounted at trial the conversation he had with Pyatt that day.

A. . . . I said, "Son, what are you doing over here?"

. . . .

A. . . . He told me, he said, "Well, [defendant] bought this land." I said, "He did?" I said, "How can he buy this land when [plaintiff] is in Cherokee?" He said, "Well, he did." I said, "How could he buy this land?" He said, "I sold it to him." I said, "What?" He said, "I sold it to him."

. . . .

A. He said, "I sold [defendant] the land for a dollar." I said, "You done what?" I said, "You don't even work." I said, "You couldn't even get a dollar." He said, "[Defendant] let me borrow it."

Q. Okay. So did he say how he got the land from [plaintiff]?

A. Yeah. He and [defendant] made a deed. I said, "Who made it?" He said, "I don't know," he said, "but he made it." I said, "Son, you are going to get into some serious trouble." And he—he said, "Well, I get in trouble all the time anyway."

. . . .

Q. Where was [defendant] standing when you had this conversation with [Pyatt]?

A. Oh, about 20 feet, I guess, or more.

. . . .

Q. Did he contradict anything that [Pyatt] said?

A. No.

The day after this conversation, Mr. Ledford witnessed someone moving plaintiff's trailer to the field next to the creek. Mr. Ledford could not identify with certainty who was in the truck, but he testified without objection that it looked like defendant. Mr. Ledford also testified that plaintiff's trailer remained by the creek for three days before another party came to take the trailer away. When Mr. Ledford asked Pyatt where the trailer was taken, he told Mr. Ledford that he sold it for \$400, and that he and defendant each took half of the proceeds.

MACE v. PYATT

[203 N.C. App. 245 (2010)]

The McFaddins' attorney, Richard Williams, testified that the McFaddins began to have concerns about their ownership interest in the Cedar Creek Property. Mr. Williams advised the McFaddins that there was a potential problem with their title, and Mr. Williams contacted defendant's attorney. Defendant testified that his attorney contacted him about purchasing the land back from the McFaddins, but defendant claimed that the McFaddins never expressed any concern about whether there was a defect in their title. A deed recorded in June 2005 shows that defendant repurchased the Cedar Creek Property from the McFaddins for \$55,000. However, defendant testified at trial that Wade Flack purchased the land from the McFaddins, even though defendant's name and signature appears on the deed and on the loan documents as a borrower.

On 4 November 2005, several transactions occurred with respect to the Cedar Creek Property: defendant transferred title to KD Properties, LLC, and KD Properties transferred its interest to David Knouse. On 22 November 2005, Mr. Knouse signed a warranty deed transferring title of the Cedar Creek Property to both defendant and Wade Flack. Defendant testified at trial that no money exchanged hands, and that the purchase money from KD Properties, \$350,000, remained in the closing attorney's trust account during all subsequent transactions.

Defendant testified at trial, and claimed that Pyatt approached him for a loan to purchase some real estate. He stated that after Pyatt bought plaintiff's land, Pyatt offered to sell defendant the Cedar Creek Property for approximately \$36,000. Defendant said that he forgave some of Pyatt's loans, traded to Pyatt several automobiles, and paid some cash in purchasing the property. Defendant denied having any knowledge of a forged deed, and said that he had no part in destroying plaintiff's trailer and other personal property.

Plaintiff offered an affidavit from Pyatt at trial. Under oath, Pyatt admitted to forging the deed wherein he purportedly received ownership of the Cedar Creek Property from plaintiff. Pyatt claimed that defendant approached him with the deed, and told him that if he signed it, defendant would forgive the debts that Pyatt owed him. The trial court limited this evidence as admissible only against Pyatt.

On 16 June 2006, plaintiff filed a complaint against Pyatt, defendant, and the McFaddins. On 25 October 2006, default judgment was entered against Pyatt as to the forged deeds, fraud, and damage to plaintiff's personal property. Defendant filed an answer to plaintiff's

MACE v. PYATT

[203 N.C. App. 245 (2010)]

complaint on 27 March 2007. Plaintiff thereafter filed an amended complaint: (1) adding Wade Flack as a defendant; (2) withdrawing the action against the McFaddins; (3) adding causes of action for forgery, trespass, and conversion; and (4) adding a claim for punitive damages. Wade Flack filed an answer and counterclaim on 12 June 2008 asking that the *lis pendens* filed by plaintiff be removed.

Trial began on 6 October 2008, and on 8 October 2008, the jury returned its verdict finding: (1) plaintiff did not execute the 20 May 2003 deed to Pyatt; (2) defendant and Pyatt conspired to have the 20 May 2003 deed executed by someone other than plaintiff; (3) Pyatt converted plaintiff's trailer and its contents to his own use; (4) defendant participated in the conversion of plaintiff's trailer and its contents; (5) plaintiff suffered damages of \$50,000; (6) Pyatt's conversion of plaintiff's personal property was accompanied by outrageous or aggravated conduct; (7) defendant's conversion of plaintiff's personal property was accompanied by outrageous or aggravated conduct; (8) plaintiff was entitled to \$500,000 in punitive damages; (9) plaintiff's cause of action was commenced within three years of Wade Flack purportedly acquiring title to the Cedar Creek Property; and (10) plaintiff's claim against Wade Flack was not barred by laches.

On 14 October 2008, defendant and Wade Flack filed motions under Rule 50 of the North Carolina Rules of Civil Procedure for a directed verdict or judgment notwithstanding the verdict and remittitur of the amount of punitive damages under section 1D-25. On 16 October 2008, the trial court entered two orders granting partial relief on the post-trial motions. The orders voided the invalid deeds, and reduced the punitive damages award from \$500,000 to \$250,000. The trial court amended its order concerning punitive damages on 12 November 2008 without any substantive changes to its ruling on the post-trial motions. Defendant and Wade Flack filed a notice of appeal on 14 November 2008 as to the judgment and the trial court's orders denying their post-trial motions.

ANALYSIS**I.**

[1] Defendant argues that the trial court erred by denying defendant's motion for directed verdict and judgment notwithstanding the verdict on the issues of: (1) whether Pyatt and defendant engaged in a conspiracy to forge the 20 May 2003 deed; (2) whether defendant converted plaintiff's belongings; and (3) whether plaintiff

MACE v. PYATT

[203 N.C. App. 245 (2010)]

was entitled to compensatory and punitive damages. We address each in turn.

A. Standard of Review

“On appeal our ‘standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury.’” *Whitaker v. Akers*, 137 N.C. App. 274, 277, 527 S.E.2d 721, 724 (2000) (citation omitted). This Court must view the evidence in the light most favorable to the non-movant, and the non-movant is entitled to every reasonable inference therefrom. *Papadopoulos v. State Capital Ins. Co.*, 183 N.C. App. 258, 262, 644 S.E.2d 256, 259 (2007). Any conflicts or inconsistencies apparent in the evidence must be construed in favor of the non-movant, and “[i]f there is more than a scintilla of evidence supporting each element of the non-moving party’s claim[,]” then a motion for a directed verdict must be denied. *Jernigan v. Herring*, 179 N.C. App. 390, 393, 633 S.E.2d 874, 877 (2006). “A scintilla is some evidence, and is defined by this Court as ‘very slight evidence.’” *State v. Lawrence*, 196 N.C. 562, 582, 146 S.E. 395, 405 (1929) (Brogden, J. dissenting) (quoting *State v. White*, 89 N.C. 462, 1883 WL 2551 (1883)).

B. Conspiracy to Commit Forgery

The elements of civil conspiracy are: “ ‘(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.’ ” *Strickland v. Hedrick*, 194 N.C. App. 1, 19, 669 S.E.2d 61, 72 (2008) (citations omitted). This formulation of conspiracy was presented to the jury by the trial court in this case.

The testimony most critical to establishing a conspiracy between defendant and Pyatt as to the preparation and execution of the 20 May 2003 deed was Mr. Ledford’s recitation of this conversation with Pyatt:

Q. Okay. So did [Pyatt] say how he got the land from [plaintiff]?

A. Yeah. *He and [defendant] made a deed*. I said, “Who made it?” He said, “I don’t know,” he said, “but *he made it*.” I said, “Son, you are going to get into some serious trouble.” And he—he said, “Well, I get in trouble all the time anyway.”

MACE v. PYATT

[203 N.C. App. 245 (2010)]

(Emphasis added.) Defendant contends that this testimony was insufficient to submit the question of conspiracy to the jury for two reasons: (1) Pyatt's allegations were inadmissible *ex parte* statements made by an alleged co-conspirator; and (2) during cross-examination, Mr. Ledford indicated that the deed Pyatt was talking about was the 2 June 2003 deed transferring Pyatt's interest to defendant and not the 20 May 2003 deed.

As to defendant's first contention, even assuming that Mr. Ledford's testimony was inadmissible, the record shows that no hearsay objection was made during this portion of Mr. Ledford's testimony. As a result, review as to whether this evidence was admissible has been waived by defendant, and we are bound to recognize Mr. Ledford's testimony as part of the evidentiary record supporting plaintiff's contention that defendant engaged in a civil conspiracy. N.C.R. App. P. 10(a)(1) (2009); *In re Rhyne*, 154 N.C. App. 477, 480 n.1, 571 S.E.2d 879, 881 n.1 (2002) (no objection to hearsay evidence results in waiver). As to defendant's second argument, we must view all alleged inconsistencies in the evidence in plaintiff's favor. *Jernigan*, 179 N.C. App. at 392-93, 633 S.E.2d at 877. Thus, even if Mr. Ledford directly contradicted his prior testimony on cross-examination, the resolution of the discrepancy was strictly within the province of the jury.

This portion of Mr. Ledford's testimony, standing alone, is certainly more than a scintilla of evidence supporting plaintiff's claim that defendant and Pyatt entered into an agreement to forge the 20 May 2003 deed, and that defendant committed acts in furtherance of the agreement which led to plaintiff's harm. *See Nye v. Oates*, 96 N.C. App. 343, 347, 385 S.E.2d 529, 531-32 (1989). Defendant's motion for directed verdict or judgment notwithstanding the verdict was thus properly denied on the issue of conspiracy. These assignments of error are overruled.

C. Conversion

Mr. Ledford also provided testimony critical to proving defendant's culpability in the conversion of plaintiff's personal property. In addition to implicating defendant regarding the forged deed, Mr. Ledford further testified, without objection:

A. Now, the next day, I looked over there and they were pulling the trailer out.

Q. Okay. Who is "they" that were pulling the trailer out?

MACE v. PYATT

[203 N.C. App. 245 (2010)]

A. I couldn't see who was in the truck, but it looked like [defendant].

Q. All right.

A. When they pulled it down, there's a field before you go up to where the trailer was, and pulled the trailer out in the field and left it there. And it stayed there—it stayed there for three days solid, that I know for sure. And the guy up the road come and got it and took it up the hill. I asked [Pyatt], I said, "What are you going to do with that trailer?" He said, "I sold it." He said—I said, "How can you sell it? It don't belong to you." He said, "Well, I did." He said, "I sold it for \$400." He said, "I got \$200 and [defendant] got \$200." That's what he told me.

Q. Okay. That he got 200 and [defendant] got 200?

A. Right.

Absent an objection by defendant in the record, this evidence was sufficient to present plaintiff's claim of conversion against defendant to the jury under the standard of review in this case. This assignment of error is overruled.

D. Damages

The record is replete with evidence showing that plaintiff did, in fact, suffer damage. Photographs of plaintiff's destroyed personal property were offered, and plaintiff testified that she has not recovered a single item of personal property that was taken. However, at trial, no evidence was offered by plaintiff as to the amount of compensatory damages that were incurred as a result of the conversion of her personal property. Defendant argues on appeal that the trial court erred by submitting the question of compensatory and punitive damages to the jury when no evidence in the record corroborates the jury's calculation of plaintiff's award.

At trial, the trial court offered commentary on the lack of evidence on compensatory damages:

But candidly speaking, there was no evidence offered as to what [the trailer's] fair market value or the contents were at the . . . time. The best evidence, if any evidence, shows and contends those parties or that party was going to sell the property for approximately \$400.

And since she doesn't have it and it's gone, the fair market value of [the trailer] . . . after conversion would be approximately

MACE v. PYATT

[203 N.C. App. 245 (2010)]

zero. What, if anything, the difference is between what it was worth and what it was worth before and after the transaction is for you and you alone to find.

Following this jury charge, the jury found the compensatory damages for plaintiff to be \$50,000. We agree with defendant that submitting the issue of compensatory damages to the jury was reversible error.

“The burden of proving damages is on the party seeking them.” *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547, 356 S.E.2d 578, 586 (1987). “When compensatory damages are susceptible of proof with approximate accuracy and may be measured by some degree of certainty, they must be so proved. Evidence wanting in such proof will not justify a verdict of substantial damages.” *Midgett v. Highway Commission*, 265 N.C. 373, 378, 144 S.E.2d 121, 125 (1965).

In *Lieb v. Mayer*, 244 N.C. 613, 94 S.E.2d 658 (1956), the plaintiff sued the defendant for damages arising from a car accident, and the jury returned a verdict in favor of the plaintiff for \$6,250. *Lieb*, 244 N.C. at 614, 94 S.E.2d at 658. At trial, the plaintiff explained, in elaborate detail, that her car was destroyed by the accident, and that defendant had caused the damage to her car. *Id.* at 615, 94 S.E.2d at 659. Our Supreme Court granted a partial new trial on the issue of compensatory damages, and provided in relevant part:

There is no evidence as to the value of plaintiff’s car before the collision or as to its condition at that time. Had it ever been in a collision before this time? How many miles had it been driven? What was its value after the wreck? What was the cost of repairs? The evidence gives no answer. It is plain that plaintiff’s evidence makes out a case for the recovery of nominal damages to her car, . . . but her evidence fails to show adequate facts upon which a substantial recovery for damages to her car can be based. Damages are never presumed. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule.

Id. at 616, 94 S.E.2d at 659-60.

Here, as in *Lieb*, plaintiff has conclusively shown that she has suffered at least nominal damages due to the loss of her trailer and other personal property. Therefore, given that there is no evidence supporting the jury’s substantial compensatory damages of \$50,000, we

MACE v. PYATT

[203 N.C. App. 245 (2010)]

must vacate the judgment on this issue, and grant a partial new trial on the issue of compensatory damages.

Defendant also claims that the trial court erred in submitting the question of punitive damages to the jury due to plaintiff's failure to show compensatory damages. However, our reversal on the issue of compensatory damages does not require us to disturb the punitive damages award.

It is well established that merely "[n]ominal damages may support a substantial award of punitive damages." *Zubaidi v. Earl L. Pickett Enters., Inc.*, 164 N.C. App. 107, 118, 595 S.E.2d 190, 196 (2004). "[O]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages." *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992) (quoting *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991)). Nominal damages need only be *recoverable* to support a punitive damages award, and a finding of nominal damages by the jury is not required where plaintiff has sufficiently proven the elements of her cause of action. *Id.*

Here, the judge instructed on nominal damages, and the jury found that plaintiff had proven her causes of action against defendant. Nominal damages were thus recoverable for the loss of her personal property as a matter of law, and plaintiff's punitive damages award can be properly supported by an award of nominal damages standing alone. *Hawkins*, 331 N.C. at 745, 417 S.E.2d at 449.

Defendant also argues that plaintiff did not prove any aggravating factors by clear and convincing evidence to support her punitive damages claim as required by N.C. Gen. Stat. § 1D-15 (2007).³

Section 1D-15 provides:

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

- (1) Fraud.
- (2) Malice.
- (3) Willful or wanton conduct.

3. Defendant does not challenge the amount of punitive damages awarded by the jury.

MACE v. PYATT

[203 N.C. App. 245 (2010)]

N.C.G.S. § 1D-15. “‘Willful or wanton conduct’ means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. ‘Willful or wanton conduct’ means more than gross negligence.” N.C. Gen. Stat. § 1D-5(7) (2007).

The jury awarded punitive damages only on plaintiff’s claim for conversion. The simple definition of conversion is “an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner’s rights.” *Myers v. Catoe Construction Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986). “‘The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner . . . and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from the act.’” *Lake Mary Ltd. Part. v. Johnston*, 145 N.C. App. 525, 532, 551 S.E.2d 546, 552 (2001) (citation omitted). “‘[T]he general rule is that there is no conversion until some act is done which is a denial or violation of the plaintiff’s dominion over or rights in the property.’” *Id.* (citation omitted).

At trial, plaintiff demonstrated that defendant did not merely deprive plaintiff of her ownership rights to her personal property; a *prima facie* showing which would have been sufficient to support a cause of action for simple conversion. Plaintiff’s personal belongings were destroyed beyond repair—some items being of significant emotional importance. By purposely entering plaintiff’s property, pillaging her assets, and then removing or eradicating every one of plaintiff’s personal possessions located at the Cedar Creek Property, defendant, at the very least, showed a “conscious and intentional disregard of and indifference to the rights and safety of others[.]” N.C.G.S. § 1D-5(7). Moreover, the jury’s finding that defendant’s conversion was accompanied by an aggravating factor was supported by clear and convincing evidence: (1) testimony that defendant and Pyatt conspired to acquire the Cedar Creek Property; (2) testimony that defendant likely moved plaintiff’s trailer to the field by the creek; (3) pictures showing that plaintiff’s personal property was vandalized; and (4) testimony that defendant and Pyatt split the proceeds of plaintiff’s trailer.

The evidence in the record shows that plaintiff proved at least one aggravating factor, willful and wanton conduct, by clear and con-

MACE v. PYATT

[203 N.C. App. 245 (2010)]

vincing evidence. Therefore, the trial court did not err in submitting the question of punitive damages to the jury, and the punitive damages award was properly supported by the evidence. Defendant's assignments of error concerning punitive damages are overruled.

Based on the foregoing, we grant a partial new trial on the amount of compensatory damages, and find no error in the punitive damages award.

II.

[2] Defendant claims that the trial court erred in submitting the second, fifth, and eighth issues to the jury. We disagree.

"[T]he trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are 'sufficiently comprehensive to resolve all factual controversies[.]'" *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988) (citation omitted), *overruled in part on other grounds*, *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). "With respect to the jury charge, this Court reviews jury instructions contextually and in their entirety." *Alston v. Britthaven, Inc.*, 177 N.C. App. 330, 334, 628 S.E.2d 824, 828 (2006). The burden is on the complaining party to show that the delivered instructions likely misled the jury. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987). "If the instructions 'present[] the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed,' then they will be held to be sufficient." *Alston*, 177 N.C. App. at 334, 628 S.E.2d at 828 (quoting *Jones v. Satterfield Dev. Co.*, 16 N.C. App. 80, 86-87, 191 S.E.2d 435, 440 (1972)).

The questions challenged by defendant read as follows:

2. If so, did the defendant, Monty Pyatt and defendant, Charles Cameron Flack conspire to have the aforesaid deed executed and delivered by someone other than plaintiff, Brenda Jane Mace?

....

5. What amount of damages, if any, is the plaintiff, Brenda Mace entitled to recover from the defendant or defendants as the case may be?

....

8. What amount of punitive damages, if any, does the jury in its discretion, award to the plaintiff, Brenda Jane Mace?

MACE v. PYATT

[203 N.C. App. 245 (2010)]

On the second jury question, defendant argues that the issue, such as it is presented, “presume[s] that both Pyatt and [defendant] were responsible for the execution and recordation of the deed rather than either of them alone[.]” Defendant’s argument has no merit, because the very essence of the question, on its face, is whether defendant and Pyatt engaged in a “conspiracy” to execute and deliver a forged deed. The inquiry of whether defendant and Pyatt undertook any individual actions regarding the 20 May 2003 deed was wholly irrelevant to the determination of whether a conspiracy existed. Since defendant makes no argument that the second question misled the jury on the issue of conspiracy, it is apparent that the trial court did not abuse its discretion in submitting this issue to the jury.

Concerning the fifth jury question, defendant claims that the issue “does not clearly separate the exposure of [defendant] for damages from that of [Pyatt].” However, the simple text of the question asks: (1) whether plaintiff is entitled to damages, and (2) whether plaintiff can recover from “either the defendant or defendants as the case may be[.]” Clearly, based on the scope of the question, the jury had the discretion to award damages as to only one or all of the named defendants, including Pyatt and defendant. Surely the jury was not misled by the question so as to be hog-tied into awarding a disproportionate amount of damages against defendant. The trial court therefore did not abuse its discretion in submitting this issue to the jury.

Defendant lastly contends that the eighth jury question unfairly links the punitive damages caused by defendant with those caused by Pyatt. Jury questions six and seven, however, quite adequately provided the jury with the ability to separate liability on the issue of punitive damages.

6. Was the defendant, Monty Pyatt’s conversion of the plaintiff, Brenda Mace’s personal property accompanied by outrageous or aggravated conduct?
7. Was the defendant, Charles Cameron Flack’s, conversion of the plaintiff, Brenda Mace’s personal property accompanied by outrageous or aggravated conduct?

Prior to these questions, the jury was given an opportunity to determine: (1) whether a conspiracy existed to forge the deed, (2) whether defendant helped Pyatt convert plaintiff’s personal property, and (3) whether one or all defendants would have to pay compensatory dam-

MACE v. PYATT

[203 N.C. App. 245 (2010)]

ages. After these three opportunities to separate the conduct of defendant from Pyatt's, the jury was given an opportunity in questions six and seven to spare defendant the burden of a punitive damages award. The jury chose not to do so. Viewing question eight in its context, there is no "no reasonable cause to believe the jury was misled or misinformed" on the issue of punitive damages. *Alston*, 177 N.C. App. at 334, 628 S.E.2d at 828 (citation omitted).

No evidence in the record shows that the trial court abused its discretion in submitting these questions to the jury. These assignments of error are overruled.

III.

[3] Defendant lastly takes exception to a portion of the jury charge where the trial court characterized part of plaintiff's cause of action.

The plaintiff Ms. Mace says and contends that Pyatt was nothing more than a straw man who did the bidding for Mr. Flack. And as such that he had this agreement or deed completed and signed by somebody other than Ms. Mace and was an act agreed upon by both of them. And she has the burden of proving that.

Defendant did not object to this portion of the jury charge at trial, despite being given two opportunities to do so. Accordingly, we dismiss this assignment of error due to defendant's failure to preserve the issue for appellate review. *Marketplace Antique Mall, Inc. v. Lewis*, 163 N.C. App. 596, 601, 594 S.E.2d 121, 125 (2004).

CONCLUSION

We grant a partial new trial on the issue of compensatory damages and otherwise find no error.

No error in part, and new trial in part.

Judges ELMORE and STEELMAN concur.

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

LARRY DONNELL GREEN, BY AND THROUGH HIS GUARDIAN AD LITEM, SHARON CRUDUP; LARRY ALSTON, INDIVIDUALLY; RUBY KELLY, INDIVIDUALLY, PLAINTIFFS V. WADE R. KEARNEY, II; PAUL KILMER; KATHERINE ELIZABETH LAMELL; PAMELA BALL HAYES; RONNIE WOOD; PHILLIP GRISSOM, JR.; DR. J.B. PERDUE, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF FRANKLIN COUNTY; LOUISBURG RESCUE AND EMERGENCY MEDICAL SERVICES, INC.; FRANKLIN COUNTY EMERGENCY MEDICAL SERVICES, EPSOM FIRE AND RESCUE ASSOCIATION, INC.; AND FRANKLIN COUNTY, NORTH CAROLINA, A BODY POLITIC, DEFENDANTS

No. COA09-787

(Filed 6 April 2010)

1. Appeal and Error— interlocutory order—subject matter jurisdiction—governmental immunity—substantial right not affected

An appeal from the denial of a medical examiner's motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity was interlocutory and was dismissed. The general rule is that sovereign immunity is a question of personal jurisdiction rather than subject matter jurisdiction.

2. Appeal and Error— interlocutory order—denial of Rule 12(b)(6) motion to dismiss—governmental immunity—substantial right affected

A denied Rule 12 (b)(6) motion to dismiss by a medical examiner was based on sovereign immunity, affected a substantial right, and was immediately appealable.

3. Public Officers and Employees— appointed county medical examiner—public officer

An appointed county medical examiner was a public officer of the State.

4. Immunity— governmental—waiver—allegation—particular language not required

Plaintiffs sufficiently alleged a waiver of sovereign immunity in a suit against a medical examiner where the allegation was that the State had waived immunity "by statute." No particular language is required in the complaint to allege waiver of sovereign immunity.

5. Immunity— governmental—county medical examiner—sued in official capacity

The trial court erred by denying a county medical examiner's Rule 12(b)(6) motion to dismiss a claim against him in his official

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

capacity where the State had not consented to being sued in superior court. To bring the State in as a third-party, the action must have originated in superior court against a defendant not protected by official sovereign immunity.

6. Immunity—governmental—waiver—county medical examiner—insurance purchased by DHHS

In an action against a county medical examiner appointed by the Department of Health and Human Services (DHHS), the proper forum for the case is the Industrial Commission even if DHHS has purchased liability insurance. The case is controlled by *Wood v. N.C. State Univ.*, 147 N.C. App. 336, and plaintiffs did not state a claim for relief in superior court against the medical examiner in his official capacity.

7. Tort Claims Act—claim not added to superior court claims

Plaintiffs were not allowed to maintain an action against a medical examiner in superior court along with other claims against the county and its employees in the interests of judicial economy, where plaintiff had already filed a claim against the State in the Industrial Commission, so that two actions already existed. Moreover, the Tort Claims Act sets out the parameters of the State's waiver of sovereign immunity, and the Court of Appeals cannot set aside statutory restrictions even in the name of judicial economy.

8. Physicians—medical examiner—individual capacity—failure to examine—not malicious or corrupt

Plaintiffs did not state a claim which could be granted against a county medical examiner in his individual capacity where plaintiffs' allegations did not support the assertion that the medical examiner's actions were in bad faith or were willful, wanton, corrupt, malicious, or recklessly indifferent. Upon arriving at the scene of an accident where an individual has been declared dead, the medical examiner is not required by statute to conduct his or her own examination, but need only take charge of the body.

Appeal by defendant J.B. Perdue from order entered 12 March 2009 by Judge Henry W. Hight, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 18 November 2009.

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

Bell & Vincent-Pope, P.A., by Judith M. Vincent-Pope for plaintiffs-appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock and J.P. Williamson, Jr., for defendant-appellant.

HUNTER, Robert C., Judge.

Doctor J.B. Perdue (“Perdue”) appeals from the trial court’s denial of his motion to dismiss the complaint filed by Larry Donnell Green (“Green”), by and through his Guardian *ad Litem*, Sharon Crudup, Larry Alston, and Ruby Kelly (collectively “plaintiffs”), which was brought pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure on the basis of sovereign immunity. After careful review, we decline to address defendant’s argument with regard to Rule 12(b)(1) as it is interlocutory and not immediately appealable. With regard to the trial court’s order pertaining to Rule 12(b)(6), we reverse.

Background

The facts as alleged in plaintiffs’ complaint show that on 24 January 2005, at approximately 8:53 p.m., emergency services were dispatched in Franklin County, North Carolina to the scene of an accident involving a pedestrian—Green—and a motor vehicle. Green suffered an open head wound as a result of the accident. Defendant Wade Kearney (“Kearney”) with the Epsom Fire Department was the first to arrive at the scene and checked Green for vital signs. Kearney determined that Green was dead and did not initiate efforts to resuscitate him.

Several minutes later, defendants Paul Kilmer (“Kilmer”) and Katherine Lamell (“Lamell”) with Franklin County EMS arrived. Kearney asked Kilmer to verify that Green did not have a pulse, but Kilmer declined to do so, stating that Kearney had already checked and that was sufficient. Without checking the pupils or otherwise manually rechecking for a pulse, Kearney and Kilmer placed a white sheet over Green’s body.

At approximately 9:00 p.m., defendants Pamela Hayes (“Hayes”) and Ronnie Wood (“Wood”) with the Louisburg Rescue Unit arrived at the scene. After being informed by Kearney and Kilmer that Green was dead, neither Hayes nor Wood checked Green for vital signs. At around 9:31 p.m., Perdue, the Franklin County Medical Examiner, ar-

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

rived at the scene. He first conducted a survey of the scene, taking notes regarding the location of Green's body and the condition of the vehicle that struck him. Once the Crime Investigation Unit arrived, Perdue inspected Green's body. While Perdue was examining Green, eight people saw movement in Green's chest and abdomen. Kearney asked Perdue whether Green was still breathing and Perdue responded: "That's only air escaping the body." Once Perdue finished examining Green, he directed that Green should be taken to the morgue located at the Franklin County jail.

At approximately 10:06 p.m., Green was transported to the morgue by Hayes and Wood where Perdue examined him. Perdue lifted Green's eyelids, smelled around Green's mouth to determine the source of an odor of alcohol that had been previously noted, and drew blood. During this particular examination, Perdue, Hayes, and Wood all observed several twitches in Green's upper right eyelid. Upon being asked if he was sure Green was dead, Perdue responded that the eye twitch was just a muscle spasm. Plaintiffs claim that Hayes did not feel comfortable with Perdue's response and went outside to report the eye twitch to Lamell. Hayes then returned inside and asked Perdue again if he was sure Green was dead. Perdue reassured Hayes that Green was, in fact, dead. Green was then placed in a refrigeration drawer until around 11:23 p.m. when State Highway Patrolman Tyrone Hunt ("Hunt") called Perdue and stated that he was trying to ascertain the direction from which Green was struck. To assist Hunt, Perdue removed Green from the drawer and unzipped the bag in which he was sealed. Perdue then noticed movement in Green's abdomen and summoned emergency services. Green was rushed to the hospital where he was treated from 25 January 2005 to 11 March 2005. Green was alive at the time this action was brought. His exact medical condition is unknown, though plaintiffs allege that he suffered severe permanent injuries.

On 22 May 2008, Green, through his guardian *ad Litem*, and Green's parents, Larry and Kelly Alston, brought this action in Franklin County Superior Court. Plaintiffs allege, *inter alia*, general negligence on the part of Perdue in his official capacity as medical examiner for Franklin County, and willful and wanton negligence on the part of Perdue in his individual capacity.¹ On 23 July 2008, in lieu of an answer, Perdue filed a motion to dismiss the claims against him pursuant to Rule 12(b)(1), which pertains to lack of subject matter

1. This appeal only concerns defendant Perdue; therefore, the claims against the other defendants will not be addressed.

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

jurisdiction in the trial court, and Rule 12(b)(6), which relates to a failure to state a claim upon which relief may be granted, on the basis of sovereign immunity. The trial court heard arguments from council concerning Perdue's motion on 17 February 2009. On 12 March 2009, the trial court denied Perdue's motion to dismiss. Perdue appeals the trial court's order.²

Analysis

Perdue argues on appeal: (1) subject matter jurisdiction was properly vested in the Industrial Commission, not the superior court and (2) plaintiffs have not stated a claim for which relief may be granted because Perdue was a public officer, and, therefore, protected by sovereign immunity in his official capacity as well as his individual capacity.

I. Interlocutory Nature of Appeal

Perdue appeals from an interlocutory order denying his motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6); therefore, we must first determine whether the order is immediately appealable. "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009).

A. Rule 12(b)(1) Motion

[1] First, Perdue claims that his Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction should be heard interlocutory because it is based on the doctrine of sovereign immunity. This Court has held that the doctrine of sovereign immunity involves a question of personal jurisdiction rather than subject matter jurisdiction. *Stahl-Rider v. State*, 48 N.C. App. 380, 269 S.E.2d 217 (1980); *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *modified and aff'd*, 287 N.C. 14, 213 S.E.2d 297 (1975).

The distinction is important because the denial of a motion to dismiss for lack of subject matter jurisdiction pursuant to . . . Rule 12(b)(1) is [not immediately appealable], but the denial of a motion challenging the jurisdiction of the court over the per-

2. Plaintiffs have also filed a claim against the State of North Carolina in the Industrial Commission.

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

son of the defendant pursuant to . . . Rule 12(b)(2) is immediately appealable.

Zimmer v. N.C. Dept. of Transportation, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116 (1987) (internal citation omitted) (holding that appeal could be heard interlocutory pursuant to Rule 12(b)(2) where the Department of Transportation claimed that under the doctrine of sovereign immunity the Industrial Commission had no jurisdiction over the person of the State).

In *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328, 293 S.E.2d 182, 184 (1982), our Supreme Court declined to determine “whether sovereign immunity is a question of subject matter jurisdiction or whether the denial of a motion to dismiss on grounds of sovereign immunity is immediately appealable.” Nevertheless, the Court recognized that N.C. Gen. Stat. § 1-277 (2009)

provides for immediate appeal of certain orders and determinations of trial judges. An order *granting* a motion to dismiss for lack of subject matter jurisdiction is immediately appealable under G.S. 1-277(a), because it determines or discontinues the action. G.S. 1-277(b) permits the immediate appeal of a ruling, whether granting or denying a motion to dismiss under Rule 12(b)(2), as to the court’s jurisdiction over the defendant’s person or property.

Teachy, 306 N.C. at 327, 293 S.E.2d at 184 (emphasis added). In sum, based on the precedent set by this Court in *Stahl-Rider* and *Sides*, the general rule is that sovereign immunity presents a question of personal jurisdiction, not subject matter jurisdiction, and denial of a motion to dismiss pursuant to Rule 12(b)(1) is not immediately appealable.

We recognize that, “interlocutory review of such an order nonetheless may be permissible if the appellant demonstrates that, under the circumstances of the particular case, the order affects a substantial right that would be jeopardized in the absence of review prior to a final determination on the merits.” *Burton v. Phoenix Fabricators & Erectors, Inc.*, 185 N.C. App. 303, 305, 648 S.E.2d 235, 237 (2007). “[T]his Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review” pursuant to N.C. Gen. Stat. § 1-277(a). *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999). Nevertheless, this Court has declined to address interlocutory appeals of a lower court’s denial of a Rule

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

12(b)(1) motion to dismiss despite the movant's reliance upon the doctrine of sovereign immunity. *See Meherrin Indian Tribe v. Lewis*, — N.C. App. —, —, 677 S.E.2d 203, 207 (2009), *disc. review denied*, — N.C. —, —, S.E.2d (2010); *N.C. Ins. Guar. Ass'n v. Board of Trs. of Guilford Technical Cmty. College*, 185 N.C. App. 518, 520-21, 648 S.E.2d 859, 860-61 (2007); *Davis v. Dibartolo*, 176 N.C. App. 142, 144-45, 625 S.E.2d 877, 880 (2006); *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001). The reasoning behind these holdings is aptly stated in *Meherrin Indian Tribe*: “[T]he claim of sovereign immunity cannot be the basis for a motion to dismiss for lack of subject matter jurisdiction.” N.C. App. at —, 677 S.E.2d at 207. Perdue has not argued any other basis for immediate appeal of his Rule 12(b)(1) motion to dismiss. *Crouse v. Mineo*, 189 N.C. App. 232, 235, 658 S.E.2d 33, 35 (2008) (“An appellant bears the burden of demonstrating that an order will adversely affect a substantial right.”). Accordingly, we are unable to address Perdue's arguments with regard to his Rule 12(b)(1) motion to dismiss.

B. Rule 12(b)(6) Motion

[2] Perdue argues that plaintiffs have not stated a claim for relief because Perdue is a public officer, and, therefore, protected by sovereign immunity in his official capacity as well as his individual capacity. Thus, Perdue contends, the trial court erred in denying his Rule 12(b)(6) motion to dismiss. This Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable. *Meherrin Indian Tribe*, — N.C. App. at —, 677 S.E.2d at 207; *Anderson v. Town of Andrews*, 127 N.C. App. 599, 601, 492 S.E.2d 385, 386 (1997) (citing *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resouces*, 108 N.C. App. 24, 27, 422 S.E.2d 338, 340 (1992), *overruled on other grounds by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997)). Accordingly, we will hear Perdue's appeal with regard to the denial of his Rule 12(b)(6) motion to dismiss.

*II. Denial of Motion to Dismiss Pursuant to Rule 12(b)(6)*A. Standard of Review

On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* “whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted [.]” We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

to no relief under any set of facts which could be proven in support of the claim.

Christmas v. Cabarrus Cty., 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009).

B. Public Officer Status

[3] Defendant Perdue was sued in his official capacity as the county medical examiner, and in his individual capacity. Perdue claims immunity on both counts. We will examine each count separately, but we must first determine whether Perdue is a public officer of the State or a public employee. This distinction is important because “[p]ublic offic[ers] cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties; public employees can.” *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888.

A public officer is someone whose position is created by the constitution or statutes of the sovereign. An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power. Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.

Id. at 113, 489 S.E.2d at 889 (internal citations and quotation marks omitted).

In North Carolina, the Chief Medical Examiner is appointed by the State Secretary of Health and Human Services. N.C. Gen. Stat. § 130A-378 (2009). The Chief Medical Examiner then appoints the various county medical examiners for three-year terms. N.C. Gen. Stat. § 130A-382 (2009). The specific duties of the medical examiner are set out in N.C. Gen. Stat. § 130A-385 (2009). Moreover, this Court has previously established that “[a] medical examiner is a public officer, and is entitled to governmental immunity if sued in his official capacity.” *Epps v. Duke University*, 116 N.C. App. 305, 309, 447 S.E.2d 444, 447 (1994) (citation omitted); *see also In re Grad v. Kaasa*, 68 N.C. App. 128, 131, 314 S.E.2d 755, 758 (“It is clear that a medical examiner is a

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

public official . . .”), *reversed on other grounds*, 312 N.C. 310, 321 S.E.2d 888 (1984). Plaintiffs’ complaint alleged that “[a]s a county Medical Examiner, appointed by the North Carolina State Chief Medical Examiner, Dr. Perdue was, at all times relevant, a public officer” We conclude that Perdue, an appointed county medical examiner, is a public officer of the State.

C. Official Capacity Claim

[4] Plaintiffs in this action did not bring suit against the State of North Carolina; however, “[a]ctions against officers of the State in their official capacities are actions against the State for the purposes of applying the doctrine of [sovereign] immunity.” *Epps*, 116 N.C. App. at 309, 447 S.E.2d at 447; *see also Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998) (“[O]fficial-capacity suits are merely another way of pleading an action against the governmental entity.”). “It is a fundamental rule that sovereign immunity renders this state . . . immune from suit absent express consent to be sued or waiver of the right of sovereign immunity.” *Data Gen. Corp.*, 143 N.C. App. at 100, 545 S.E.2d at 246 (citations omitted).

Perdue claims that plaintiffs failed to allege a waiver of the State’s sovereign immunity. “In order to overcome a defense of [sovereign] immunity, the complaint must specifically allege a waiver of [sovereign] immunity. Absent such an allegation, the complaint fails to state a cause of action.” *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (internal citations omitted), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). “This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity.” *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005). Here, plaintiffs sufficiently alleged in their complaint that the State has waived immunity “by statute”; however, we must still determine if plaintiffs have properly alleged a claim for which relief may be granted against Perdue in his official capacity.

[5] N.C. Gen. Stat. § 143-291 *et seq.* (2009), commonly known as the Tort Claims Act, provides a limited waiver of sovereign immunity for negligence actions against public officers when acting in their official capacity. “The State may be sued in tort only as authorized in the Tort Claims Act.” *Guthrie v. State Ports Authority*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983).

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

The effect of the Tort Claims Act was twofold. First, the State partially waived its sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment. Second, the Act provided that the forum for such direct actions would be the Industrial Commission, rather than the State courts.

Teachy, 306 N.C. at 329, 293 S.E.2d at 185.

Plaintiffs in this case have brought suit against a public officer of the State in superior court, seeking monetary relief. In *Harwood v. Johnson*, 92 N.C. App. 306, 307, 374 S.E.2d 401, 403 (1988), *aff'd in part and reversed in part on other grounds*, 326 N.C. 231, 388 S.E.2d 439 (1990), the plaintiff brought a negligence action against the Secretary of the Department of Correction, the Chairman and members of the Parole Commission, and a parole case analyst, in their official and individual capacities. Plaintiff also sued the Superintendent of the Rowan County Prison Unit in his official capacity only. *Id.* The defendants filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6), which was denied by the trial court. *Id.* at 308, 374 S.E.2d at 403. On appeal, this Court only addressed the denial of the motion to dismiss pursuant to Rule 12(b)(6). *Id.* The Court ultimately held:

The doctrine of sovereign immunity—that the State cannot be sued in its own courts, or in any other, without its consent—is firmly established in the common law of North Carolina. Our Supreme Court has also established that when an action is brought against individual state officers or employees in their official capacities, the action is one against the State for the purposes of applying the doctrine of sovereign immunity. We hold here that there can be no monetary award against any named defendants in his or her official capacity, because the award would in essence be against the State and the State has not consented to suit in this forum. Therefore, dismissal of plaintiff's state law claims for monetary damages against all defendants in their official capacities was correct and we affirm that part of the trial court's order.

Id. at 309, 374 S.E.2d at 403-04 (internal citations omitted). Upon discretionary review, our Supreme Court upheld this Court's ruling with regard to that particular issue, stating:

Since the doctrine of sovereign immunity applies, a suit cannot be maintained in the superior court against defendants in

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

their official capacities. The decision of the Court of Appeals affirming the dismissal of the complaint as to the Secretary of the Department of Correction, the Chairman and Members of the Parole Commission, and the Superintendent of the Rowan County Prison Unit, in their official capacities, is affirmed.

Harwood v. Johnson, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990). Based upon the precedent set in *Harwood*, we hold that plaintiffs in this case have not stated a claim for which relief may be granted in superior court. Plaintiffs have sued a public officer in his official capacity, which is equivalent to a suit against the State. *Epps*, 116 N.C. App. at 309, 447 S.E.2d at 447. The State has not consented to be sued in the superior court, therefore, the trial court erred in denying Perdue's Rule 12(b)(6) motion to dismiss the claim against him in his official capacity.

We recognize that while the State may not be directly sued in superior court for negligence, "the State may be joined as a third-party defendant in the state courts in an action for contribution or in an action for indemnification." *Meyer*, 347 N.C. at 109, 489 S.E.2d at 887; *see also Teachy*, 306 N.C. at 331, 293 S.E.2d at 186 (after being sued by decedent's wife for negligent operation of motor vehicle, defendant brought third-party complaint against Department of Transportation, alleging negligence in maintenance of traffic light where decedent was killed); N.C. Gen. Stat. § 1A-1, Rule 14(c) (2009) ("Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina may be made a third party under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Tort Claims Act."); N.C. Gen. Stat. § 1B-1(h) (2009) ("The provisions of this Article shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission. The State's share in such cases shall not exceed the pro rata share based upon the maximum amount of liability under the Tort Claims Act."). As seen in *Teachy*, to bring in the State as a third-party, the action must properly originate in superior court against a defendant not protected by official sovereign immunity. 306 N.C. at 331, 293 S.E.2d at 186. That is not the case here where plaintiffs have, in effect, brought a direct action against the State in a forum where the State has not consented to be sued.

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

[6] Plaintiffs argue that if this Court declines to affirm the trial court's order outright, then this case should be remanded to the trial court for a determination of whether the Department of Health and Human Services ("DHHS"), the state agency that appointed Perdue, waived sovereign immunity through the purchase of liability insurance. Plaintiffs claim that if DHHS purchased liability insurance, then jurisdiction would lie in the superior court for amounts up to the limits of the insurance coverage. Plaintiffs argument is without merit.

Plaintiffs point to N.C. Gen. Stat. § 143-291(b), which states: "If a State agency, otherwise authorized to purchase insurance, purchases a policy of commercial liability insurance providing coverage in an amount at least equal to the limits of the State Tort Claims Act, such insurance coverage shall be in lieu of the State's obligation for payment under this Article." In *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 556 S.E.2d 38 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002), this Court addressed whether N.C. Gen. Stat. § 143-291(b) waives the State's sovereign immunity beyond that established in N.C. Gen. Stat. § 143-291(a). The Court determined:

Strictly construing the language at issue here, we believe that the phrase "such insurance coverage shall be in lieu of the State's obligation for payment under this Article," N.C.G.S. § 143-291(b), is more consistent with a designation of the source of payment than with a designation of the forum for adjudication.

In the absence of language explicitly expressing such intent, we are constrained to hold that the General Assembly did not intend N.C.G.S. § 143-291(b) to waive the State's sovereign immunity beyond that specified in N.C.G.S. § 143-291(a), and that *jurisdiction over tort claims against the State and its agencies remains exclusively with the Industrial Commission.*

Wood, 147 N.C. App. at 343, 556 S.E.2d at 43 (emphasis added).

Plaintiffs cite to this Court's holding in *Parham v. Iredell County Dept. of Social Services*, 127 N.C. App. 144, 148, 489 S.E.2d 610, 613 (1997), where we concluded that the Iredell Department of Social Services was acting as a state agency "during its involvement in adoption proceedings," but that the trial court would, nevertheless, have jurisdiction over the matter if the county purchased liability insurance. Plaintiffs' reliance on *Parham* is misplaced. The holding in

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

Parham was based on this Court's erroneous determination in *Meyer* that a county department of social services ("DSS") is a state agency for purposes of the Tort Claims Act, but if DSS purchased liability insurance, then the Industrial Commission was divested of jurisdiction over the claim. The holding in *Meyer* was premised on a perceived conflict between N.C. Gen. Stat. § 143-291 and N.C. Gen. Stat. § 153A-435 (2009), which provides that a county may purchase liability insurance, but purchase of such insurance waives its governmental immunity. This Court held:

Under the plain language of G.S. 143-291(b), the Tort Claims Act no longer controls the payment of damages where a State agency has procured liability insurance with policy limits equal to or greater than the \$100,000 cap provided for in G.S. 143-291(a). It follows logically that G.S. 143-291(b) requires that the Tort Claims Act is no longer controlling with regard to jurisdiction once a governmental entity has procured liability insurance with policy limits equal to or greater than \$100,000. Jurisdiction is then controlled by the statute authorizing the governmental entity to purchase liability insurance.

Meyer, 122 N.C. App. at 513, 471 S.E.2d at 427. The Supreme Court reversed this Court and held that DSS is not a *state agency* entitled to *sovereign immunity* under the Tort Claims Act, despite the fact that it may be acting as a *state agent*; therefore, DSS could be sued in superior court if it waived *governmental immunity* through the purchase of liability insurance. *Meyer*, 347 N.C. at 108, 489 S.E.2d at 886. Based on the Supreme Court's holding in *Meyer*, there is, in fact, no conflict between N.C. Gen. Stat. § 143-291 and N.C. Gen. Stat. § 153A-435 in this instance.

Accordingly, we find that *Wood* is controlling on this issue, not this Court's holdings in *Meyer* or *Parham*. Consequently, even if DHHS has purchased liability insurance, the proper forum for this case is the Industrial Commission and plaintiffs have not stated a claim for relief in the superior court against defendant Perdue in his official capacity.

[7] Finally, plaintiffs argue that in the interest of judicial economy, they should be permitted to maintain an action against Perdue in superior court along with their other claims against the county and its employees since two trials would "constitute a waste of judicial time and resources." Plaintiffs neglect to mention in their brief that they have already filed a claim against the State in the Industrial Com-

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

mission. Therefore, two actions already exist in this matter. Moreover, as discussed *supra*, the Tort Claims Act sets out the parameters of the State's waiver of sovereign immunity. Here, the State has not consented to be sued in the trial court and we cannot set aside statutory restrictions even in the name of judicial economy. *Riviere v. Riviere*, 134 N.C. App. 302, 304, 517 S.E.2d 673, 675 (1999) ("Where the language of a statute is clear and unambiguous, this Court is bound by the plain language of the statute."). Based on the foregoing analysis, we hold that the trial court erred in denying Perdue's Rule 12(b)(6) motion to dismiss the claims against him in his official capacity.

D. Individual Capacity Claim

[8] In their individual capacity claim against Perdue, plaintiffs rely on the same allegations of fact that were stated in their claim for general negligence against Perdue; however, they further allege that his actions were "[in] bad faith, or willful, wanton, corrupt, malicious or recklessly indifferent[.]" and that Perdue acted outside the scope of his duties as a public officer. Perdue denies these claims and argues that, as a public officer acting within the scope of his duties, he is entitled to immunity from suit.

"[I]f a public officer is sued in his individual capacity, he is entitled to immunity for actions constituting mere negligence, but may be subject to [personal] liability for actions which are *corrupt, malicious or outside the scope of his official duties*." *Epps*, 116 N.C. App. at 309, 447 S.E.2d at 447 (emphasis added).

The essence of the doctrine of public official immunity is that public officials engaged in the performance of their governmental duties involving the exercise of judgment and discretion, and acting within the scope of their authority, may not be held liable for such actions, in the absence of malice or corruption.

Price, 132 N.C. App. at 562, 512 S.E.2d at 787. "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *In re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984). " 'An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' " *Id.* at 313, 321 S.E.2d at 890-91 (quoting *Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E.2d 530, 535 (1968)). "[A] conclusory allegation that a public official acted

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion.” *Meyer*, 347 N.C. at 114, 489 S.E.2d at 890. Upon review of the allegations in plaintiffs’ complaint, we hold that plaintiffs have not stated a claim for which relief may be granted against Perdue in his individual capacity.

Plaintiffs allege that the following acts were perpetrated outside and beyond Perdue’s duties and authority:

- a. failing to determine if he was dealing with someone who was dead prior to beginning a forensic examination of that person;
- b. failing, upon three separate and specific inquiries, to determine if Green was dead or alive at the scene;
- c. directing that Green be removed from the scene to the morgue when Green was not in fact dead;
- d. attempting to determine the cause of death of someone who was not dead;
- e. disregarding evidence of breathing while examining Green’s exposed chest;
- f. concluding that the twitching in Green’s right upper eyelid was because of muscle spasms “like a frog leg lumping in a frying pan” when Green was in fact alive;
- g. holding on to his erroneous conclusion that Green was dead when questioned whether Green was alive after he, himself, and others observed Green’s right eyelid twitch several times;
- h. dissuading the paramedics and first responders from checking or rechecking Green for vital signs or otherwise reevaluating Green’s condition;
- i. handling Green as if he were a corpse when Green was, in fact, alive; and
- j. failing to provide any medical treatment.

The allegations establish that Perdue acted under the assumption that Green was deceased and that he disregarded signs that Green was still alive; however, we find that these allegations do not support plaintiffs’ assertion that Perdue’s actions were “[in] bad faith, or willful, wanton, corrupt, malicious or recklessly indifferent”

GREEN v. KEARNEY

[203 N.C. App. 260 (2010)]

Moreover, Perdue did not act outside the scope of his employment. N.C. Gen. Stat. § 130A-385 states in pertinent part:

Upon receipt of a notification under G.S. 130A-383, the medical examiner shall take charge of the body, make inquiries regarding the cause and manner of death, reduce the findings to writing and promptly make a full report to the Chief Medical Examiner on forms prescribed for that purpose.

Upon arriving at the scene of an accident where an individual has been declared dead, the medical examiner is not required by statute to conduct his or her own examination to ascertain whether the individual is dead. The medical examiner need only take charge of the deceased's body. *Id.* Certainly, a medical examiner, while ascertaining the "cause and manner of death," should ensure that the individual is, in fact, dead where questions have been raised as to whether the individual is actually alive; however, the failure to investigate in such a scenario does not place the medical examiner outside the scope of his authority.

We find that Perdue's actions, while arguably negligent, did not rise to the level of malicious or corrupt conduct, nor was he acting outside the scope of his authority as a county medical examiner. As stated *supra*, Perdue is a state officer and is afforded sovereign immunity for claims against him in his individual capacity for mere negligence. *Epps*, 116 N.C. App. at 309, 447 S.E.2d at 447. Accordingly, we hold that the trial court erred in denying Perdue's Rule 12(b)(6) motion to dismiss the claims against him in his individual capacity.

Conclusion

Based on the foregoing we dismiss Perdue's appeal of the trial court's denial of his Rule 12(b)(1) motion to dismiss. We reverse the trial court's order denying Perdue's motion to dismiss the claims against him in his official and individual capacity pursuant to Rule 12(b)(6).

Dismissed in part; reversed in part.

Judges BRYANT and JACKSON concur.

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

HOPE-A WOMEN'S CANCER CENTER, P.A., PLAINTIFF-PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, DEFENDANT-RESPONDENT, AND ASHEVILLE RADIOLOGY ASSOCIATES, P.A., THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A/ CAROLINAS HEALTHCARE SYSTEM, AMI SUB OF NORTH CAROLINA, INC. D/B/A CENTRAL CAROLINA HOSPITAL, CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. D/B/A CAPE FEAR VALLEY HEALTH SYSTEM, DUKE UNIVERSITY HEALTH SYSTEM, INC., FRYE REGIONAL MEDICAL CENTER, INC., HIGH POINT REGIONAL HEALTH SYSTEM, HUGH CHATHAM MEMORIAL HOSPITAL, INC., NORTH CAROLINA HOSPITAL ASSOCIATION, HENDERSON COUNTY HOSPITAL CORPORATION D/B/A MARGARET R. PARDEE MEMORIAL HOSPITAL, MISSION HOSPITALS, INC., REX HOSPITAL, INC., AND WAKEMED, RESPONDENT-INTERVENORS

No. COA08-1548

(Filed 6 April 2010)

1. Declaratory Judgments— certificate of need—new institutional health service

The trial court did not err in affirming the Department of Health and Human Service's (DHHS) declaratory ruling that plaintiff Hope's project was a "new institutional health service" requiring a certificate of need (CON). The trial court applied the proper standard of review to DHHS's ruling and Hope's project fit within the definition of a "new institutional service" under N.C.G.S. § 131E-176(16)(f1). A Services Agreement pursuant to which Hope would gain possession of equipment identified in (f1) was a "comparable agreement" by which Hope would acquire the equipment within the meaning of the CON law.

2. Declaratory Judgment— certificate of need—bases of DHHS ruling

The trial court did not err in affirming the Department of Health and Human Service's (DHHS) declaratory ruling that plaintiff Hope's project required a certificate of need where the ruling denied Hope's request "not only for the reasons stated in the ruling, but also for 'additional bases' not discussed in the ruling." Contrary to Hope's contention, this did not "incorporate 416 additional pages of argument against Hope" into the ruling but simply stated that DHHS considered the comments of the Intervenor and that the comments supported the ruling.

3. Attorney Fees— declaratory judgment—certificate of need

The trial court did not err in denying plaintiff Hope's request for attorney fees in a certificate of need declaratory judgment action because Hope was not the prevailing party.

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

Appeal by Petitioner from judgment entered 26 June 2008 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 18 August 2009.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Denise M. Gunter, Wallace C. Hollowell, III, and Franklin Scott Templeton, for Petitioner-Appellant.

Attorney General Roy A. Cooper, by Assistant Attorney General June S. Ferrell, for Respondent-Appellee.

Bode, Call & Stroupe, LLP, by Robert V. Bode, Diana Evans Ricketts, and S. Todd Hemphill, for Respondent-Intervenor-Appellees AMI SUB of North Carolina Inc. d/b/a Central Carolina Hospital, Frye Regional Medical Center, Inc., Hugh Chatham Memorial Hospital, Inc., NCHA, Inc., d/b/a North Carolina Hospital Association.

K&L Gates LLP, by Gary S. Qualls, Colleen M. Crowley, and William W. Stewart, Jr., for Respondent-Intervenors-Appellees The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System, Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System, High Point Regional Health System, and Rex Hospital, Inc.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray, Terrill Johnson Harris, and Allyson Jones Labban, for Respondent-Intervenor-Appellees WakeMed, Mission Hospitals, Inc., and Henderson County Hospital Corporation d/b/a Margaret R. Pardee Memorial Hospital.

Kirschbaum, Nanney, Keenan & Griffin, PA, by Frank S. Kirschbaum, for Respondent-Intervenor-Appellee Asheville Radiology Associates, P.A.

Catharine W. Cummer, for Respondent-Intervenor Appellee Duke University Health System, Inc.

BEASLEY, Judge.

Hope-A Women's Cancer Center, P.A. (Hope) appeals from a judgment, affirming a declaratory ruling by the North Carolina Department of Health and Human Services, Division of Health Service Regulation (DHHS). DHHS denied Hope's request for a declaratory ruling that its "entry into the Services Agreement described in [its] request and its provision of diagnostic and radiation

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

oncology services to its patients by means of that Services Agreement (the ‘project’¹)” would not constitute a “new institutional health service” as defined in N.C. Gen. Stat. § 131E-176(16),” but instead ruled that Hope would be required to obtain a certificate of need (CON) for the project. For the reasons stated below, we affirm.

Hope is a health service facility, located in Asheville, North Carolina, dedicated to the diagnosis and treatment of cancer and related diseases in women. In its request for declaratory ruling, Hope proposed to enter into a Services Agreement with an unidentified “out-of-state business corporation” (Provider). By the terms of the Services Agreement, the Provider would furnish Hope with diagnostic and radiation oncology services to provide for its patients. These services would be provided using the following equipment: a linear accelerator with a multi-leaf collimator, a dual use positron emission tomography (PET) scanner with computerized tomography (CT) capability (which would be used for both diagnostic and treatment simulation purposes), and a magnetic resonance imaging (MRI) scanner (collectively, Equipment). The Provider would also furnish personnel, ancillary equipment, disposable supplies, maintenance services, and technical support necessary to the functioning of the Equipment. The terms of the Services Agreement would also provide for the following, in pertinent part:

[T]he Provider will retain the risk of any loss or damage to the Equipment, and will be responsible for its insurance. The Provider will be liable for any property or other taxes on the Equipment. No specifically identified unit of the Equipment will be required to be furnished under the Services Agreement. So long as the Equipment meets the specifications set forth in the Services Agreement, the Provider will have the option to select the particular units of the Equipment to be used, and substitute units of the Equipment as may become necessary. Hope will not purchase, lease or otherwise acquire any ownership or property interest in the Equipment.

1. By use of the term “project” to describe Hope’s proposed undertaking, we are *not* using it as defined by N.C. Gen. Stat. § 131E-176(20), which defines “Project” to mean “a proposal to undertake a capital expenditure *that results in the offering of a new institutional health service* as defined by this Article.” N.C. Gen. Stat. § 131E-176(20) (2009) (emphasis added). As the issue presented by Hope’s request for declaratory ruling was whether Hope’s proposed undertaking would constitute a “new institutional health service,” to use the term in that manner would presume the answer to that issue. We use the term “project” only for convenience and because that is the term used in Hope’s petition for judicial review.

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

In November 2007, Hope submitted a request for a declaratory ruling pursuant to N.C. Gen. Stat. § 150B-4 and N.C. Admin. Code tit. 10A, r. 14A-0103 (June 2008). Hope requested a determination that its proposed project, including entry into the Services Agreement, did not constitute a “new institutional health service” as defined in N.C. Gen. Stat. § 131E-176(16) and therefore, did not require it to obtain a CON. Hope’s request for declaratory ruling was opposed by Asheville Radiology Associates, P.A., North Carolina Hospital Association, The Charlotte Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System (CHS), Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System (Cape Fear), High Point Regional Health System (High Point), Rex Hospital, Inc. (Rex), Onslow Memorial Hospital, Inc., Southeast Radiation Oncology Group, P.A., Wake Med, Central Carolina Hospital, Hugh Chatham Memorial Hospital, Inc., Mission Hospitals, Inc., and Margaret R. Pardee Memorial Hospital (collectively, Commentators); all filed comments with DHHS opposing Hope’s request for declaratory judgment. The North Carolina Medical Society submitted written comments in support of Hope’s declaratory ruling request.

On 16 January 2008, DHHS filed a declaratory ruling denying Hope’s request for a ruling that its proposed project would not require a CON. In February 2008, Hope petitioned for judicial review of DHHS’s ruling in Wake County Superior Court, pursuant to N.C. Gen. Stat. §§ 150B-4, 150B-43, 150B-45, and 150B-46. Respondent-Intervenors-Appellees AMI SUB of North Carolina, Inc. d/b/a Central Carolina Hospital, Frye Regional Medical Center, Inc., Hugh Chatham Memorial Hospital, Inc., NCHA, Inc. d/b/a The North Carolina Hospital Association, Asheville Radiology Associates, P.A., Duke University Health System, Inc., Henderson County Hospital Corporation d/b/a Margaret R. Pardee Memorial Hospital, Mission Hospitals, Inc., Rex Hospital, Inc., Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System, High Point Regional Health System, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System and WakeMed (collectively, Intervenors) filed motions to intervene on 4 April 2008, and these motions were granted by an order entered on 26 June 2008. The order allowing intervention permitted each Intervenor to have the same rights as a party and to participate fully in all aspects of the proceeding. In June 2008, the Wake County Superior Court affirmed DHHS’s ruling. From this order, Hope appeals.

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

[1] Hope first argues that the trial court erred in affirming DHHS's declaratory ruling that Hope's project was a "new institutional health service" requiring a CON. Hope contends that its proposed project is not a "new institutional health service" under any subsection of N.C. Gen. Stat. § 131E-176(16). We disagree.

The standard of review

regarding an administrative decision consists of examining the superior court order for errors of law; i.e. determining first whether the superior court utilized the appropriate scope of review and, second, whether it did so correctly. The nature of the error asserted by the party seeking review of the agency decision dictates the proper scope of review.

Christenbury Surgery Ctr. v. N.C. Dep't of Health & Human Servs., 138 N.C. App. 309, 311-12, 531 S.E.2d 219, 221 (2000) (citing *In re Declaratory Ruling by North Carolina Com'r of Ins.*, 134 N.C. App. 22, 517 S.E.2d 134 (1999)). If the appellant claims that the agency decision was based upon an error of law, review is *de novo*. *Christenbury*, 138 N.C. App. at 312, 531 S.E.2d at 221. If the alleged error is "one of statutory interpretation, the reviewing court is not bound by the agency's interpretation of the statute, although some deference is traditionally afforded the agency interpretation." *Id.* (citation omitted).

The trial court's order states that it reviewed DHHS's declaratory ruling *de novo*. Thus, the trial court applied the proper standard of review. We must now consider whether the trial court correctly applied *de novo* review to the legal issues raised by this appeal.

The General Assembly has set forth the activities requiring a CON in N.C. Gen. Stat. § 131E-178 as follows, in pertinent part:

(a) No person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department

. . . .

(b) No person shall make an *acquisition by donation, lease, transfer, or comparable arrangement* without first obtaining a certificate of need from the Department, *if the acquisition would have been a new institutional health service if it had been made by purchase*. In determining whether an acquisition would have been a new institutional health service, the capital expenditure

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

for the asset shall be deemed to be the fair market value of the asset or the cost of the asset, whichever is greater.

N.C. Gen. Stat. §§ 131E-178(a)-(b) (2009) (emphasis added). “The fundamental purpose of the certificate of need law is to limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for their benefit.” *In Re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986).

N.C. Gen. Stat. § 131E-176(16) defines the term “[n]ew institutional health services” as used in 131E-178(a). Hope contends that four subsections of N.C. Gen. Stat. § 131E-176(16) are potentially applicable to the project but argues that none of these subsections applies because of the features of the Services Agreement. The subsections which Hope argues are potentially applicable are:

b. Except as otherwise provided in G.S. 131E-184(e), the obligation by any person of a capital expenditure exceeding two million dollars (\$2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion, or replacement of any plant or equipment with respect to which an expenditure is made shall be included in determining if the expenditure exceeds two million dollars (\$2,000,000).

....

f1. The acquisition by purchase, donation, lease, transfer, or comparable arrangement of any of the following equipment by or on behalf of any person:

....

5a. Linear accelerator.

....

7. Magnetic resonance imaging scanner.

8. Positron emission tomography scanner.

9. Simulator.

....

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

p. The acquisition by purchase, donation, lease, transfer, or comparable arrangement by any person of major medical equipment.
. . . .

s. The furnishing of mobile medical equipment to any person to provide health services in North Carolina, which was not in use in North Carolina prior to the adoption of this provision, if such equipment would otherwise be subject to review in accordance with G.S. 131E-176(16)(f1.) or G.S. 131E-176(16)(p) if it had been acquired in North Carolina.

N.C. Gen. Stat. § 131E-176(16) (2009).

We first note that if Hope's proposed project would fit within the definition of a "new institutional health service" under any subsection of N.C. Gen. Stat. § 131E-176(16), a CON would be required for the project. The fact that the project would not be covered under any of the approximately seventeen other potential definitions of "new institutional health service" is irrelevant. Therefore, if any one of the potential definitions as noted above were applicable to Hope's proposed project, it would constitute a "new institutional health service" and would thus require a CON under N.C. Gen. Stat. § 131E-178(a).

We also note that the proposed Services Agreement was not provided by Hope in its request for declaratory ruling; Hope gave only a general description of the major terms of the proposed agreement. In fact, the Respondent-Intervenors have argued that the request for declaratory ruling lacked sufficient information in several respects for DHHS to make a ruling and that for DHHS to do so, it would have to make findings of fact, which would be inappropriate in this proceeding for declaratory ruling. In this regard, the ruling found that "the Request lacks sufficient information and specificity to issue the ruling that Hope seeks." However, DHHS found that Hope did describe the "proposed transaction in enough detail to demonstrate that it would be a violation of the CON law if consummated in the manner described."

Based upon the information provided in Hope's request for declaratory ruling, the definition of N.C. Gen. Stat. § 131-176(16)(f1) is the most applicable to Hope's proposed project, and we will therefore address the application of this subsection.

Section 131E-176(16)(f1) states the following, in pertinent part:

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

(16) "New institutional health services" means any of the following:

....

f1. The acquisition by purchase, donation, lease, transfer, or comparable arrangement of any of the following equipment by or on behalf of any person:

....

5a. Linear accelerator.

....

7. Magnetic resonance imaging scanner.

8. Positron emission tomography scanner.

9. Simulator.

N.C. Gen. Stat. § 131E-176(16)(f1) (2009).

DHHS found that in Hope's request for a declaratory judgment, "[t]he acquisition of any of the[] pieces of [E]quipment to be offered or developed in North Carolina by either Hope or the Provider . . . is subject to the requirement for a CON." DHHS ruled that "[a]cquiring the ability to provide services using the Equipment in the State of North Carolina pursuant to some arrangement with an out-of-state Provider, regardless of how it is labeled or packaged, is a comparable arrangement under N.C. Gen. Stat. §§ 131E-176(16)(f1) and 131E-178(b)." Hope contends that it was not proposing to *acquire* the Equipment by purchase, donation, lease, transfer, or comparable arrangement and that DHHS ignored rules of statutory construction.

First, the type of equipment that is to be furnished to Hope by the Provider is specifically enumerated under N.C. Gen. Stat. § 131E-176(16)(f1). Pursuant to the Services Agreement, Hope would receive a linear accelerator, magnetic resonance imaging scanner, positron emission tomography scanner, and a simulator. Secondly, DHHS correctly ruled that Hope was acquiring the Equipment through an arrangement which is "comparable" to a purchase, donation, lease, or transfer. Hope argues that because it would not have any ownership or property interest in the Equipment and because the Equipment would continue to be owned by the Provider, that it would not "acquire" the Equipment and that the Services Agreement is not a "comparable arrangement." We disagree.

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990) (citations omitted). Therefore, the rules of statutory construction "are relevant . . . only in those instances in which the interpretation of the statute is ambiguous or in doubt." *Realty Corp. v. Coble, Sec. of Revenue*, 291 N.C. 608, 612, 231 S.E.2d 656, 659 (1977). However, "[t]he interpretation of a statute given by the agency charged with carrying it out is entitled to great weight." *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citation omitted).

We must determine the meaning of the word "acquisition" as it is used in N.C. Gen. Stat. § 131E-176(16)(f1). The statute states that an acquisition may occur by a purchase, donation, lease, transfer or a "comparable arrangement." An "acquisition" is defined by BLACK'S LAW DICTIONARY as "[t]he gaining of possession or control over something." BLACK'S LAW DICTIONARY 24 (7th ed. 1999). Hope's Services Agreement falls within this definition, as it would give Hope possession of the Equipment and would permit Hope to use the Equipment to provide services to its patients. Hope's request for a declaratory ruling even stated that "the Provider [would] furnish to Hope [the Equipment] for the benefit of Hope's patients." Although Hope's possession of the Equipment may not be permanent and the Equipment's title may not be in Hope's name, the fact that the Equipment would be in Hope's possession and control to the extent that it were used to provide services to Hope's patients constitutes an "acquisition" in the plain meaning of the term.

The ruling that the Services Agreement is a "comparable arrangement" by which Hope would "acquire" the Equipment is also in keeping with the CON law's stated purpose. The purpose of the certificate of need law is "to control the cost, utilization, and distribution of health services[.]" *In re Denial of Request by Humana Hospital Corp.*, 78 N.C. App. 637, 646, 338 S.E.2d 139, 145 (1986). By requiring health care facilities to obtain a CON before providing new institutional health services, the General Assembly intended to "limit the construction of health care facilities [and the growth of new institutional health services] in this state to those that the public needs and that can be operated efficiently and economically for their benefit." *Humana*, 81 N.C. App. at 632, 345 S.E.2d at 237; *see also* N.C. Gen.

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

Stat. § 131E-175 (2009). One objective of the CON law is to limit and control what new institutional health services are offered in the state, and the Equipment to be used under the proposed Services Agreement is specifically identified in N.C. Gen. Stat. § 131E-176(16)(f1). We see no reason not to give deference to DHHS's interpretation of the statute and its conclusion that "acquiring the ability to provide services using the Equipment in the State of North Carolina pursuant to some arrangement with an out-of-state provider, regardless of how it is labeled or packaged, is a comparable arrangement under N.C. Gen. Stat. § 131E-176(16)(f1) and 131E-178(b)." This interpretation is both logical and consistent with the purposes of the CON law. Accordingly, we conclude that the trial court did not err in affirming DHHS's ruling that Hope's proposal was an "acquisition" of equipment, and thus was governed by the CON law.

Because the trial court properly affirmed DHHS's ruling based upon N.C. Gen. Stat. § 131E-176(16)(f1), it is not necessary for us to address Hope's arguments as to why the Services Agreement does not constitute a "new institutional health service" under other subsections of N.C. Gen. Stat. § 131E-176(16), which Hope contends could potentially apply. Even if the Services Agreement did not fall under any of the other subsections, Hope would still be required to obtain a CON for the project based upon N.C. Gen. Stat. § 131E-176(16)(f1).

[2] In Hope's second argument, Hope contends that the trial court erred in affirming DHHS's ruling because DHHS's declaratory ruling denied Hope's request "not only for the reasons stated in the ruling, but also for 'additional bases' not discussed in the ruling." Hope argues that "[t]he Department's attempt to adopt these additional bases for its ruling was made upon unlawful procedure and was in substantial violation of Hope's right to meaningful appellate review." Accordingly, Hope argues that DHHS's ruling should be limited to the grounds set forth in the ruling itself. We disagree.

In its declaratory ruling, DHHS noted that the parties which opposed the request for a declaratory ruling, collectively known as the "Commentators," had provided "a number of useful analyses of the Request." The declaratory ruling stated that:

[a]ll of the Commentators have put forth theories and cited authority suggesting that I should deny the Request. I have considered all of the Comments as well as the arguments of Hope. To the extent the Commentators' theories and authority are not encompassed in the discussion above, it is not because they lack

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

merit, but rather because they constitute additional bases for denial of the Request.

N.C. Admin. Code tit. 10A, r. 14A.0103 provides that DHHS may request and consider comments from those who may be affected by the ruling in its consideration of a request for a declaratory ruling.

(f) A declaratory ruling procedure may consist of written submissions, oral hearings, or such other procedure as may be appropriate in a particular case.

(g) The Director may issue notice to persons who might be affected by the ruling that written comments may be submitted or oral presentations received at a scheduled hearing.

N.C. Admin. Code tit. 10A, r. 14A.0103(f)-(g) (June 2008). In accordance with Rule 14A.0103, DHHS received and considered comments from many Commentators, as noted above. The Commentators presented the legal arguments and authorities, some of which were similar and some of which differed from the arguments presented by others. As this was a declaratory ruling proceeding, there was necessarily no factual information provided by the Commentators. Hope did not object to the participation of the Commentators, to any of the particular comments provided by any Commentators, or to DHHS's consideration of those comments. Nor did Hope's petition for judicial review before the trial court take any exception to DHHS's consideration of any particular comments submitted. Hope's only exception related to the comments was:

It appears that DHHS, through the North Carolina Hospital Association, solicited the comments from the Commentators, knowing that the Commentators, the majority of which are hospitals, would be opposed to this request from Hope, a physician group. The Commentators, via the North Carolina Hospital Association, agreed that the Declaratory Ruling Request should be denied, and communicated their desire to DHHS that the Declaratory Ruling Request should be denied.

Thus, Hope appears to claim that DHHS was biased against it, as it objected only to DHHS's alleged selective "solicitation" of comments opposed to its request. Therefore, under N.C.R. App. P. Rule 10(a), this is the only issue regarding the comments which Hope has preserved for appeal before this Court. "To properly preserve a question for appellate review a party must request, and receive, a ruling on the question from the trial court. N.C.R. App. P. 10(b)(1) (2006)." *Bio-*

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

Medical Applications of N.C., Inc. v. N.C. Dep't of Health & Human Servs., 179 N.C. App. 483, 487, 634 S.E.2d 572, 576 (2006).

Rule 14A.0103(g) provides that DHHS may “issue notice to persons who might be affected by the ruling” so that they may comment upon the requested declaratory ruling. Hope does not contend or argue that the Commentators were not “persons who might be affected by the ruling.” Hope has not demonstrated that DHHS made its ruling “upon unlawful procedure” by its consideration of the comments. N.C. Gen. Stat. § 150B-51(3) (2009). Indeed, Hope acknowledges that “the record fails to disclose how the Commentators learned of Hope’s request” but argues that “a reasonable inference from the circumstances is that DHHS notified them and solicited their views. Unfortunately, such off-the-record communications between Director Fitzgerald and incumbent providers, if they occurred here, would not be unprecedented.”² Certainly, the trial court did not err by failing to make an “inference” of impropriety in DHHS’s procedure where the record admittedly contains no indication of such impropriety.

Hope also argues that the bases for the ruling were unlawful because the ruling referenced the arguments of the Intervenor as “additional bases” for its determination, without specifying the exact argument upon which it relied. Hope argues:

The Department purported to deny Hope’s request not only for the reasons stated in the ruling, *but also* for “*additional bases*” not discussed in the ruling. By referring to *all* of the Intervenor’s otherwise-unnamed “theories and authority” as “additional bases for denial,” Department Director Fitzgerald attempted to incorporate 416 *additional pages of argument against Hope* into his ruling. DHHS was so intent on denying Hope’s request that *every* Intervenor’s argument was deemed meritorious and every argument raised by Hope was deemed worthless.”

We disagree with Hope’s contention of the ruling as “incorporating” all 416 pages of the comments opposing its request. The ruling properly stated the legal bases for its denial of Hope’s request, ad-

2. Hope is referring to *Mission Hosps., Inc. v. N.C. Dept. of Health & Human Services*, 189 N.C. App. 263, 272, 658 S.E.2d 277, 282 (2008), in which this Court held “that the Director’s *ex parte* communication with petitioner’s counsel in the preparation of the Final Agency Decision violated the plain language of N.C. Gen. Stat. § 150B-135 and that this violation constitutes an error of law under N.C. Gen. Stat. § 150B-51(b). . . .” However, in *Mission Hospitals*, the *ex parte* communications were clearly demonstrated in the record.

HOPE-A WOMEN'S CANCER CTR., P.A. v. N.C. DEPT OF HEALTH & HUMAN SERVS.

[203 N.C. App. 276 (2010)]

dressings each of Hope's arguments as to the four potential definitions of "new institutional health services," which could apply to its proposed project. Read in the context of the entire ruling, the disputed provision does not adopt any particular legal argument put forth by any Commentator other than those already addressed by the ruling; the disputed provision simply states that DHHS did fully consider the comments and that they support DHHS's ruling. This argument is also without merit.

[3] Lastly, Hope argues that the trial court erred in denying Hope's request for attorney's fees because an award of attorneys' fees would have been just and because DHHS acted without substantial justification. Hope contends that DHHS's "refusal to apply the law as it exists to the facts . . . are 'special circumstances' that support an award of attorney's fees." We disagree.

Hope argues that pursuant to N.C. Gen. Stat. § 6-19.1, because DHHS acted without substantial justification in pressing its claim against Hope, this supports an award of attorney's fees. N.C. Gen. Stat. § 6-19.1 (2009) provides:

[i]n any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the *prevailing party* to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

(emphasis added). "[I]t is imperative to note that G.S. § 6-19.1 is not applicable, and cannot be used by [a party] to recover attorney's fees unless [the party is] found to be the prevailing party." *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195, 412 S.E.2d 893, 896 (1992). Necessarily, because Hope was not the prevailing party, we reject its argument. This assignment of error is overruled.

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

For the foregoing reasons, we affirm.

Affirmed.

Judges WYNN and STROUD concur.

LOUIS H. WATKINS, EMPLOYEE, PLAINTIFF V. TROGDON MASONRY, INC., EMPLOYER,
AND STONEWOOD INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA09-758

(Filed 6 April 2010)

1. Workers' Compensation— evidence—best evidence rule

The Industrial Commission did not err by allowing into evidence the transcript of plaintiff's recorded statement made to defendant's insurance adjuster instead of the original recording pursuant to N.C.G.S. § 8C-1, Rule 1003. The insurance adjuster fully authenticated the transcription of the statement and also testified to her own, independent recollection of the statement.

2. Workers' Compensation— compensability—accident not arising out of employment

The Industrial Commission did not err in finding and concluding that plaintiff employee's fall was noncompensable because the evidence supported the findings of fact and the findings supported the conclusion of law that plaintiff's injury was due solely to an "idiopathic condition" and did not arise out of his employment. Plaintiff's argument that the Commission erred in finding that plaintiff's fall was caused by his heart condition was misguided as the Commission did not make such a finding.

Appeal by Plaintiff from Opinion and Award entered 23 March 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2009.

Hardison & Cochran, P.L.L.C., by J. Adam Bridwell, for Plaintiff-Appellant.

Brooks, Stevens & Pope, P.A., by Bambee B. Blake and Ginny P. Lanier, for Defendants-Appellees.

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

BEASLEY, Judge.

Louis H. Watkins (Plaintiff) appeals from an Opinion and Award of the North Carolina Industrial Commission concluding that Plaintiff did not suffer a compensable injury by accident arising out of his employment, and denying Plaintiff's claim for workers' compensation benefits. For the following reasons, we affirm.

Background

The factual and procedural history of this case is largely undisputed and may be summarized as follows: Plaintiff was born on 7 September 1932 and his employment history consisted primarily of truck driving. In 2007, Plaintiff was employed by Defendant Trogdon Masonry as a driver whose duties included transporting fuel and equipment to Defendant's job sites. On 8 May 2007, Edward Harold Trogdon (Mr. Trogdon), owner of Trogdon Masonry, Inc., called Plaintiff and told him to take Defendant's tractor trailer, loaded with scaffolding and a forklift, to "Ronnie's Country Store," to have the mechanics at Ronnie's repair a flat tire on Defendant's forklift. Plaintiff drove to Ronnie's in Defendant's truck, hauling the forklift. After examining the tire, an employee at Ronnie's told Plaintiff the forklift needed a new tire. However, Plaintiff did not have authorization to approve the additional expense of a new tire, and told the mechanic that he would need to get approval from Mr. Trogdon. Plaintiff tried several times to reach Mr. Trogdon on his cell phone but got no answer. While waiting to get in contact with Mr. Trogdon, Plaintiff sat down on a palette of feed bags. Eventually, a Ronnie's employee told Plaintiff that they "need[ed] to know" whether or not Trogdon would approve the replacement tire. Plaintiff testified that he got up from the palette, stretched, straightened up and turned left, then walked maybe a half dozen steps, before falling on his left hip. Plaintiff later told Defendant's insurance adjuster that "my left leg just gave away on me some how or another and I just hit, hit the floor." There were no witnesses to Plaintiff's fall.

After his fall, Plaintiff was taken to Johnston Memorial Hospital in Smithfield, North Carolina, where he was diagnosed with an acetabular fracture resulting from the fall. Medical tests also revealed that Plaintiff suffered from chronic blocked coronary arteries. Plaintiff was transferred from the hospital in Smithfield to Wake Medical Center in Raleigh, North Carolina, for treatment of his hip fracture and newly-discovered heart disease. Plaintiff's treating cardiologist offered expert medical testimony that Plaintiff did not

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

fall as a result of a heart attack as the condition of his coronary arteries was “not consistent” with a recent heart attack. Plaintiff remained in the hospital for several weeks and did not work after his fall on 8 May 2007.

On 20 July 2007, Plaintiff filed an Industrial Commission Form 18 Claim for Workers’ Compensation benefits. Defendant Trogdon Masonry, Inc. and their insurance carrier, Defendant Stonewood Insurance Company, filed an Industrial Commission Form 61 denying Plaintiff’s claim. On 30 July 2007, Plaintiff filed an Industrial Commission Form 33, requesting a hearing. In their Industrial Commission Form 33-R response to Plaintiff’s request for a hearing, Defendants asserted that “plaintiff’s injuries are the sole result of an idiopathic condition and are not related to his employment.”

On 8 May 2008, a hearing was conducted before Deputy Commissioner Adrian Phillips. Plaintiff testified on his own behalf, and Defendants offered testimony from Mr. Trogdon and Defendant Trogdon Masonry’s office manager, Debra Davison. The parties also deposed four of Plaintiff’s treating physicians, as well as Marta Fitzpatrick, an insurance adjuster who conducted a tape-recorded telephone interview with Plaintiff. On 25 August 2008, Commissioner Phillips issued an Opinion and Award. The Commissioner found that Plaintiff had suffered a compensable injury by accident and awarded Plaintiff disability and medical workers’ compensation benefits. Defendants appealed to the Full Commission, which issued an Opinion on 23 March 2009, reversing Deputy Commissioner Phillips. The Commission, in denying workers’ compensation benefits to Plaintiff, concluded that Plaintiff’s fall “was due to an idiopathic condition or physical infirmity which caused his leg to give way” and that Plaintiff’s injuries “did not result from an accident arising out of his employment with defendant.” Plaintiff appeals from the Commission’s Opinion denying his claim for workers’ compensation benefits.

Standard of Review

“ ‘Our review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law.’ ” *Egen v. Excalibur Resort Prof’l*, 191 N.C. App. 724, 728, 663 S.E.2d 914, 918 (2008) (quoting *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 29-30, 630 S.E.2d 681, 685 (2006)). On appeal, the Commission’s findings of fact can be set aside “when there is a complete lack of competent evidence to support

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

them.” *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007) (internal quotation marks omitted). However, “[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Gore v. Myrtle/Mueller*, 362 N.C. 27, 40-41, 653 S.E.2d 400, 409 (2007) (internal quotation marks omitted). “The Commission’s legal conclusions are reviewable by the appellate courts *de novo*.” *Estate of Gainey*, 184 N.C. App. at 503, 646 S.E.2d at 608.

Defendants assert, and the Commission found, that Plaintiff’s fall was not compensable because it was due solely to an “idiopathic condition.” Plaintiff argues that the competent evidence in the record does not support the Full Commission’s conclusion that Plaintiff’s fall did not arise out of his employment, but was due to an idiopathic condition, and therefore not compensable. We disagree.

Plaintiff’s 3 July 2007 Statement

[1] Before addressing the main issue as to whether the Commission erred by finding and concluding that Plaintiff’s fall did not arise out of his employment, we will address the evidentiary issue raised by Plaintiff regarding his recorded statement of 3 July 2007, as the relevant contested factual findings are based at least in part upon evidence from this statement. Plaintiff argues that the Commission erred by its admission and consideration of his recorded statement to Marta Fitzpatrick on 3 July 2007 because it was “not the best evidence documenting” this statement. In the statement, Ms. Fitzpatrick asked Plaintiff to describe how his injury occurred, and he answered, in part, as follows:

I couldn’t hear on the phone so I got up and made a little . . . left turn and when I did made a left turn I just ah I mean I knew what was going on the whole time my leg my left leg just gave away on me some how or another and I just hit, hit the floor. And they had to get me up.

Plaintiff argues that his 3 July 2007 statement was inadmissible under N.C. Gen. Stat. § 8C-1, Rules 1002, 1003 and 1004, because Defendant used a transcript of the recording and did not provide the original recording and under N.C. Gen. Stat. § 8C-1, Rule 403, arguing that the probative value of the statement was outweighed by the danger of unfair prejudice. We note that Plaintiff failed to assign as error finding of fact No. 9:

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

9. On 3 July 2007, the adjuster obtained plaintiff's recorded statement. Therein, plaintiff stated that he fell after his leg gave away. He also confirmed that he was just walking and his leg gave out.

However, Plaintiff did assign error to finding of fact No. 10, which provides that

10. Although plaintiff denied that his leg gave way at the hearing before the deputy commissioner, plaintiff consistently advised his employer and stated in his recorded statement that his left leg gave way, causing him to fall. After considering the testimony of plaintiff, Harold Trogdon, and Debbie Davison and the competent evidence of record, the Full Commission finds that the greater weight of the competent and credible evidence shows that plaintiff's fall is not unexplained and that it resulted from plaintiff's leg giving way due to an unknown physical infirmity.

Although Plaintiff's assignments of error are not entirely consistent, Plaintiff has argued based upon the assignment of error to finding No. 10 that the Commission erred by considering Plaintiff's statement, so we will address this issue despite his failure to assign as error finding No. 9.

Plaintiff argues that the transcript of his statement should not have been admitted under N.C. Gen. Stat. § 8C-1, Rule 1003 (2009), which provides that: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

Although Plaintiff argues that he objected to the admission of the statement during Ms. Fitzpatrick's deposition, the record reveals that Plaintiff did not object on the basis that the original recording was not made available to him, but made only a general objection. In addition, Ms. Fitzpatrick stated that she had the original recording of the statement with her at the deposition, but Plaintiff's counsel did not ask for it or admit it into evidence. *See Setzer v. Boise Cascade Corp.*, 123 N.C. App. 441, 445, 473 S.E.2d 431, 433 (1996) ("[A] party's failure to enter a timely and specific objection constitutes a waiver of his right to challenge the alleged error on appeal."); N.C.R. App. P. 10(b)(1).

Ms. Fitzpatrick fully authenticated the transcription of the statement and also testified to her own independent recollection of her conversation with Plaintiff, thus providing independent and unchal-

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

lenged evidence of the same statements by Plaintiff that his leg “gave way.” Plaintiff’s remaining arguments regarding the statement are directed to its weight and credibility, such as his argument that he was still on pain medication at the time of the statement. However, any questions of the weight to give to the evidence or the credibility of Plaintiff’s statements on 3 July 2007 as opposed to his testimony at the hearing are solely for the Commission to determine. *Gore*, 362 N.C. at 40-41, 653 S.E.2d at 409. Plaintiff’s arguments as to the admission or consideration of his 3 July 2007 statement are without merit.

Arising Out of Employment

[2] Plaintiff argues that the Commission erred by finding that Plaintiff’s fall was “due solely to an idiopathic condition” as this finding is “unsupported and contradicted by the testimony and evidentiary record[.]” Plaintiff’s brief indicates that this argument is based upon all twelve of his assignments of error, which challenge Findings of Fact 6, 7, 8, 10, and 12, and conclusion of law No. 3. However, the single issue presented here is whether the Commission erred by finding that Plaintiff’s fall was not the result of an accident arising out of his employment.

“To establish ‘compensability’ under the North Carolina Workers’ Compensation Act . . . a ‘claimant must prove three elements: (1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment.’” *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (quoting *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). In this case, the parties disagree about whether Plaintiff’s injury was caused by an “accident arising out of and in the course of the employment[.]” N.C. Gen. Stat. § 97-2(6) (2009).

Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Commission is conclusive if supported by any competent evidence; otherwise, not. The words “out of,” refer to the origin or cause of the accident and the words “in the course of,” to the time, place and circumstances under which it occurred. For an accident to arise out of the employment there must be some causal connection between the injury and the employment. When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

the hazard common to others, it does not arise out of the employment. In such a situation the fact that the injury occurred on the employer's premises is immaterial. A fall itself is usually regarded as an accident.

Cole v. Guilford Co. & Hartford Acci. & Indem. Co., 259 N.C. 724, 726-27, 131 S.E.2d 308, 310-11 (1963) (citations omitted).

Here, there is no dispute that Plaintiff had an accident, the fall, which was in the course of his employment, as he was at work at the time of his fall. However, Plaintiff must also demonstrate that his fall arose out of his employment—that there was “some causal connection between the injury and the employment.” *Id.*

Factually, Plaintiff argues that his fall was not caused by his heart condition and that the Commission erred by finding that his fall was “not unexplained and [that it was] due solely to an idiopathic condition.” Plaintiff's argument seems to imply that the Commission found that the idiopathic condition which caused Plaintiff's fall was actually his heart condition. Plaintiff's argument suffers from two flaws. First, he confuses the meaning of the term “idiopathic,” and second, the Commission did not find that his heart condition caused his fall.

The word “idiopathic” has two definitions: (1) “arising spontaneously or from an obscure or unknown cause[;]” (2) “peculiar to the individual[.]” Merriam-Webster's Collegiate Dictionary 616 (11th ed. 2003); *See Hodges v. Equity Grp.*, 164 N.C. App. 339, 343, 596 S.E.2d 31, 35 (2004) (“An idiopathic condition is one arising spontaneously from the mental or physical condition of the particular employee.” (internal quotation marks omitted)). It is true that Plaintiff's heart condition is idiopathic in the sense of the second meaning stated; his heart condition is a condition that is peculiar to him. However, there is no dispute that Plaintiff's heart condition did not cause his fall. The Commission did not so find and Defendant does not argue that the heart condition caused the fall.

In support of his argument that the Commission tacitly found that his fall was caused by his heart condition, Plaintiff notes testimony from Ms. Fitzpatrick that while Plaintiff was still hospitalized shortly after his fall, she was informed by someone from Trogdon Masonry that his fall was due to his heart condition. There appears to be no dispute that while being treated after his fall, Plaintiff's heart condition was discovered, and he was actually treated for this condition. As noted above however, it was later determined that he did not suffer a heart attack and his fall was unrelated to his heart condition.

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

However, Plaintiff's argument implies that the Commission erroneously found that his fall was actually caused by his heart condition. Plaintiff argues that

[t]he testimony in this matter clearly alludes to the fact the Defendants **assumed** the Plaintiff's **heart condition** caused him to faint and thus fall to the ground, which is clearly unsupported by the stipulated medical evidence. Therefore, the Full Commission of the Industrial Commission giving controlling weight to the testimony of the Defendants that the Plaintiff's leg gave way because of his heart condition or from fainting is clearly in error as it is unsupported by the medical testimony. As such, the Full Commission of the Industrial Commission erred in concluding the Plaintiff's fall was not compensable as the medical evidence and lay testimony do not support the inference that the fall was not unexplained and due solely to an idiopathic condition. (emphasis added).

However, the Commission did not find that Plaintiff's fall was caused by his heart condition; the Commission actually made the following findings of fact, which Plaintiff has not assigned as error:

9. On 3 July 2007, the adjuster obtained plaintiff's recorded statement. Therein, plaintiff stated that he fell after his leg gave away. He also confirmed that he was just walking and his leg gave out.

....

11. The evidence does not establish, due to his employment, that plaintiff was at an increased risk of harm from a fall. He was not in an elevated position or next to dangerous machinery which could create a greater risk of injury from a fall. Plaintiff did not step on a foreign object on the floor; the floor was not uneven, slippery, or wet; plaintiff did not hit anything and was not pushed; and he did not fall down steps or stairs. Nothing about plaintiff's employment subjected him to a peculiar hazard to which the public is not generally exposed. Dr. Alioto and Dr. Chiavetta testified that the fall could have happened anywhere.

The Commission's additional challenged findings of fact which are relevant to the issue of whether the accident arose out of Plaintiff's employment are:

7. Plaintiff's employer, Harold Trogdon, spoke with plaintiff on the phone shortly after his fall. During the conversation, plaintiff

WATKINS v. TROGDON MASONRY, INC.

[203 N.C. App. 289 (2010)]

stated that when he stood up from the feed bag his left leg ‘gave way’ and he fell. Mr. Trogdon subsequently visited plaintiff in the hospital, during which time plaintiff advised that he would not be filing a workers’ compensation claim because his heart caused him to fall. Consequently, Mr. Trogdon did not immediately notify the workers’ compensation insurance carrier of plaintiff’s incident and plaintiff filed his medical bills with his private health insurance carrier.

8. Debbie Davison is the Office Manager for defendant. While Ms. Davison typically files a Form 19 within days of an accident at work, she did not file a Form 19 in this case until on or about 28 June 2007 because, prior to that time, plaintiff maintained that he was not going to file a workers’ compensation claim. Ms. Davison testified that her understanding of the incident was that plaintiff’s leg gave way, that plaintiff was being treated for his heart, and that plaintiff’s heart was the reason he was unable to work.

....

10. Although plaintiff denied that his leg gave way at the hearing before the deputy commissioner, plaintiff consistently advised his employer and stated in his recorded statement that his left leg gave way, causing him to fall. After considering the testimony of plaintiff, Harold Trogdon, and Debbie Davison and the competent evidence of record, the Full Commission finds that the greater weight of the competent and credible evidence shows that plaintiff’s fall is not unexplained and that it resulted from plaintiff’s leg giving way *due to an unknown physical infirmity*. (emphasis added).

The findings as to Plaintiff’s heart condition were included to explain the reasons Plaintiff did not immediately file a workers’ compensation claim and the employer did not file a Form 19 immediately after Plaintiff’s fall. The findings of fact taken in their entirety, including findings which are unchallenged, demonstrate that the Commission was using the term “idiopathic” in its first sense: Plaintiff’s fall was spontaneous and “due to an unknown physical infirmity.” Although Plaintiff argues that the Commission erred in its finding that his fall “resulted from plaintiff’s leg giving way due to an unknown physical infirmity,” there is no evidence in the record which offers any explanation of a cause for the fall other than the fact that his leg “gave way” and he fell. There is no evidence as to the reason his leg

“gave way” and thus the conclusion of law No. 3 refers to his fall as “due to an idiopathic condition.”

Plaintiff also argues that certain portions of the findings of fact 7, 8, and 10 were not supported by the evidence. However, Plaintiff’s arguments focus on the credibility of the witnesses and the weight which the Commission should give to each witness’s testimony; Plaintiff does not argue that the witnesses did not testify to the facts as stated in the challenged findings of fact. Upon review of the testimony of these witnesses, we find that they did clearly testify to the facts as found by the Commission. Actually, even Plaintiff’s own testimony does not significantly contradict the testimony of Ms. Fitzpatrick, Mr. Trogdon, or Ms. Davison as to any of the relevant facts about his fall. As the “[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony[.]” *Gore*, 362 N.C. at 40-41, 653 S.E.2d at 409, Plaintiff’s assignments of error regarding the findings of fact are overruled.

Idiopathic Condition

Plaintiff assigned error to conclusion of law No. 3, which states:

3. As plaintiff’s fall on 8 May 2007 was due to an idiopathic condition or physical infirmity which caused his leg to give way and as his employment did not create a hazard which increased his risk of injury from a fall on that occasion, plaintiff’s injuries on 8 May 2007 did not result from an accident arising out of his employment with defendant Therefore, based upon the foregoing Conclusions of Law, plaintiff is not entitled to indemnity benefits under or medical compensation under the Workers’ Compensation Act for his injuries on 8 May 2007.

Plaintiff claims that “the Full Commission’s reliance upon defendants [sic] assertion that plaintiff’s fall is due solely to an idiopathic condition is unsupported and contradicted by the testimony and evidentiary record, therefore making the Full Commission’s conclusion based thereon untenable.” Again, Plaintiff’s argument focuses on the facts supporting this conclusion, which we have already found above to be supported by the record. Because the facts fully support the Commission’s conclusion that “plaintiff’s fall on 8 May 2007 was due to an idiopathic condition or physical infirmity which caused his leg to give way . . . plaintiff’s injuries . . . did not result from an accident arising out of his employment with defendant,” Plaintiff’s assignment of error as to this conclusion of law is without merit.

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

Conclusion

As competent evidence in the record supports the Commission's findings of fact, and those findings of fact support the Commission's conclusions of law, *Egen*, 191 N.C. App. at 728, 663 S.E.2d at 918, we affirm the Commission's denial of Plaintiff's claim for workers' compensation benefits.

Affirmed.

Judges STEPHENS and STROUD concur.

RICHARD EDWARD CROWLEY, JR., PLAINTIFF-APPELLANT v. CAROLYN W. CROWLEY,
DEFENDANT-APPELLEE

No. COA09-898

(Filed 6 April 2010)

1. Appeal and Error— interlocutory order—remaining issues resolved—appeal considered

The Court of Appeals considered plaintiff's appeal from the trial court's order dismissing his claim for alimony even though it was interlocutory when appeal was noticed. Because the remaining issues of child support and equitable distribution were resolved after appeal was noticed, there was nothing left for the trial court to determine.

2. Appeal and Error— violations of Appellate Rules of Procedure—dismissal not warranted

Plaintiff's alleged violations of the Appellate Rules of Procedure did not warrant dismissal, and the merits of the appeal were reached.

3. Divorce— alimony claim—failure to reply to counterclaim—not deemed an admission

The trial court erred in dismissing plaintiff's claim for alimony after ruling that plaintiff effectively admitted that he was not a dependent spouse by failing to reply to defendant's counterclaim. Defendant failed to make a specific counterclaim for alimony and plaintiff's failure to file a reply re-asserting allegations already made in his complaint did not amount to an admission under N.C.G.S. § 1A-1, Rule 8(d).

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

Appeal by Plaintiff from order entered 12 February 2009 by Judge Christy T. Mann in District Court, Mecklenburg County. Heard in the Court of Appeals 2 December 2009.

The Honnold Law Firm, P.A., by Bradley B. Honnold, for Plaintiff-Appellant.

James, McElroy & Diehl, P.A., by G. Russell Kornegay, III and Preston O. Odom, III, for Defendant-Appellee.

McGEE, Judge.

Richard Edward Crowley (Plaintiff) and Carolyn W. Crowley (Defendant) were married on 2 March 1996 and separated on 20 July 2007. Plaintiff filed a complaint on 25 October 2007 seeking child custody, child support, post separation support, alimony and equitable distribution, along with a motion for interim distribution. Defendant filed an answer and counterclaims on 19 December 2007. Plaintiff did not file a reply to Defendant's counterclaims.

Plaintiff and Defendant executed a parenting agreement that was approved by the trial court in an order entered 21 August 2008, which effectively resolved the issue of child custody. A trial was held on the issues of child support, alimony, and equitable distribution on 11 February 2009.

At trial, Defendant moved for a dismissal of Plaintiff's alimony claim on the grounds that Plaintiff had failed to reply to Defendant's counterclaims. The trial court heard arguments from counsel and allowed Plaintiff's attorney the evening of 11 February 2009 to research the issue. In an order entered 12 February 2009, the trial court granted Defendant's motion to dismiss Plaintiff's alimony claim. Plaintiff appeals.

Interlocutory Nature of the Appeal

[1] We begin by addressing Defendant's contention that this appeal is interlocutory. "An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order." *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001). Generally, there is no right of appeal from an interlocutory order. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). Though Defendant asserts that this appeal was interlocutory when Plaintiff filed his notice of appeal, Defendant also "submits that [we] now

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

[have] jurisdiction over [the] appeal,” because the remaining issues have since been fully resolved. We agree.

Interlocutory appeals are disfavored in order to “prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division.” *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). Our Court addressed the effect of the resolution of remaining issues on an otherwise interlocutory appeal in *Tarrant v. Freeway Foods of Greensboro*, 163 N.C. App. 504, 593 S.E.2d 808, *disc. review denied*, 358 N.C. 739, 603 S.E.2d 126 (2004). In *Tarrant*, the plaintiff appealed from the trial court’s dismissal of two of his four claims. *Id.* at 507, 593 S.E.2d at 811. We noted that, after dismissal of only two of the plaintiff’s claims, his appeal “would have been interlocutory[.]” *Id.* at 507-08, 593 S.E.2d at 811. The plaintiff then voluntarily dismissed the remaining two claims. *Id.* at 508, 593 S.E.2d at 811. Our Court conducted the following analysis:

At this juncture, we believe that the interests of justice would be furthered by hearing the appeal. All claims and judgments are final with respect to all the parties, and there is nothing left for the trial court to determine. Therefore, the rationale behind dismissing interlocutory appeals, the prevention of fragmentary and unnecessary appeals, does not apply in this case. In fact, any delay on our part would impede, rather than expedite, the efficient resolution of this matter. For these reasons, we decline to dismiss the appeal and will consider the case on the merits.

Id. See also *Jones v. Harrelson and Smith Contractors*, — N.C. App. —, —, 670 S.E.2d 242, 249 n.2 (2008).

Defendant has moved to amend the record on appeal to reflect certain developments in the case since the notice of appeal was filed. We grant Defendant’s motion and note the following facts. In this case, the trial court granted Defendant’s motion to dismiss the alimony claim, leaving unresolved Plaintiff’s claims for child support and equitable distribution. Plaintiff gave notice of appeal on 13 March 2009. Because Plaintiff’s appeal concerned an order dismissing one of his claims, but leaving his remaining claims unresolved, Plaintiff’s appeal was interlocutory. However, the trial court entered a judgment and order on 7 July 2009, resolving the issues of equitable distribution, child support, and attorneys’ fees. In light of the trial court’s resolution of the remaining issues, “there is nothing left for the trial

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

court to determine.” *Tarrant*, 163 N.C. App. at 508, 593 S.E.2d at 811. Therefore, the rationale for dismissing interlocutory appeals does not apply in this case and we will consider Plaintiff’s appeal. *See Id.*

Rules Violations

[2] Defendant cites to numerous alleged violations of the N.C. Rules of Appellate Procedure in Plaintiff’s brief. Defendant includes in her brief a list of seven alleged rules violations, “two of which are of fundamental import here (that is, rules 10(c)(1) and 28(b)(4)).” Our Supreme Court addressed in detail the methods by which our Court is to respond to appellate rules violations in *Dogwood Dev. & Mgmt. v. White Oak Transport*, 362 N.C. 191, 657 S.E.2d 361 (2008). In *Dogwood*, the Supreme Court indicated that rules violations were of three broad categories: jurisdictional violations, non-jurisdictional violations, and waiver. *Id.* at 194, 657 S.E.2d at 363. The Court instructed that non-jurisdictional violations “normally should not lead to dismissal of the appeal.” *Id.* at 198, 657 S.E.2d at 365. The Court noted that:

Two examples of such [non-jurisdictional] rules are those at issue in the present case: Rule 10(c)(1), which directs the form of assignments of error, and Rule 28(b), which governs the content of the appellant’s brief.

Noncompliance with rules of this nature, while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction.

Id.

We note that in the present case, the two rules violations that Defendant asserts are “of fundamental import” are the precise rules that the Supreme Court in *Dogwood* instructed do not ordinarily warrant dismissal. We take further instruction from *Dogwood*, that “[i]n most situations when a party substantially or grossly violates non-jurisdictional requirements of the rules, the appellate court should impose a sanction other than dismissal and review the merits of the appeal.” *Id.* Therefore, we will review the merits of the appeal.

Failure to Reply to Counterclaims

[3] Plaintiff argues that the trial court erred by dismissing his alimony claim based on his failure to reply to Defendant’s counterclaims. Plaintiff contends that Defendant did not assert a counter-

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

claim on the issue of alimony “to which a reply was either required or permitted.” For reasons discussed below, we reverse the trial court’s ruling on this issue.

“The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable[.]” N.C. Gen. Stat. § 50-16.3A(a) (2010). In the present case, the trial court dismissed Plaintiff’s alimony claim after concluding that Plaintiff effectively admitted that he was not a dependent spouse and that Defendant was not a supporting spouse. The trial court made these conclusions based in part on N.C. Gen. Stat. § 1A-1, Rules 7 and 8. N.C. Gen. Stat. § 1A-1, Rule 7 provides in pertinent part that “[t]here shall be a . . . reply to a counterclaim denominated as such[.]” N.C. Gen. Stat. § 1A-1, Rule 7(a) (2010). N.C. Gen. Stat. § 1A-1, Rule 8 provides in pertinent part that “[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.” N.C. Gen. Stat. § 1A-1, Rule 8(d) (2010).

Defendant’s answer and counterclaims contained the following:

AFFIRMATIVE DEFENSES**First Affirmative Defense**

...

45. [Plaintiff] is not a dependent spouse of his marriage to [Defendant], and [Defendant] is not a supporting spouse of her marriage to [Plaintiff], as [Plaintiff] is underemployed and is intentionally depressing his income in order to receive alimony from [Defendant]. As a result, [Plaintiff] is not entitled to post-separation support and/or alimony from [Defendant], and [Defendant] pleads this as an affirmative defense to [Plaintiff’s] claims for postseparation support and/or alimony.

...

COUNTERCLAIMS

...

FACTUAL ALLEGATIONS

...

74. Upon information and belief, [Plaintiff] is currently employed at the YMCA. In the past, [Plaintiff] earned an annual salary of

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

\$30,000 working eight hours per week as an assistant at [Defendant's] dental practice. [Plaintiff] has also owned his own art gallery in the past, "Stretch Gallery," but failed to operate it in a way that was profitable. Upon information and belief, [Plaintiff] voluntarily closed his gallery in October 2007 in order to increase his chances of receiving an award of alimony and child support from [Defendant]. [Plaintiff] had equipment in the gallery that was worth, upon information and belief, \$15,000. [Plaintiff] has a B.A. from Texas Tech in Art and is deliberately depressing his income in order to avoid his child support obligation and to receive alimony from [Defendant].

Still under the heading "counterclaims," Defendant then asserted the following claims for relief:

First Claim for Relief
Child Custody and Support

80. [Defendant] incorporates by reference and realleges as if fully set forth herein the admissions, responses and allegations set forth in the preceding paragraphs.

81. [Defendant] is entitled to an award of sole custody of the parties' minor children, both temporary and permanent. Custody with [Defendant] is in the best interests and welfare of the minor children.

82. It is appropriate that the [c]ourt enter an [o]rder providing for the support of the minor children, both temporary and permanent.

Second Claim for Relief
Retroactive Child Support

83. [Defendant] incorporates by reference and realleges as if fully set forth herein the admissions, responses and allegations set forth in the preceding paragraphs.

84. [Defendant] has expended reasonable and considerable sums of money on behalf of the minor children since the date of separation without assistance from [Plaintiff].

85. [Defendant] is entitled to an [o]rder requiring [Plaintiff] to pay to [Defendant] at least one-half (1/2) of the actual expenditures incurred on behalf of the minor children from the date of separation to the date [Plaintiff] filed his Complaint.

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

Third Claim for Relief
Equitable Distribution

86. [Defendant] incorporates by reference and realleges as if fully set forth herein the admissions, responses and allegations set forth in the preceding paragraphs.

87. Pursuant to N.C.G.S. § 50-20, *et seq.*, [Defendant] is entitled to an unequal distribution of marital property and divisible property in her favor and an equitable distribution of the marital and divisible debt.

Plaintiff contends that the trial court erred by applying N.C.G.S. § 1A-1, Rule 8(d) to this case because Defendant did not assert a counterclaim related to alimony. We agree there was no counterclaim for alimony in Defendant's answer, but note there were three specific counterclaims which incorporated, by reference, and re-alleged those portions of paragraph number 45 which related to alimony.

Therefore, Defendant did assert three counterclaims to which a reply would generally be required. Incorporated by reference in those counterclaims are allegations which, if deemed admitted, would undermine Plaintiff's recovery on his alimony claim. Those allegations are properly labeled an affirmative defense in Defendant's answer under paragraph 45, and are simply affirmative statements which serve to negate claims already made by Plaintiff in his complaint. *See* N.C.G.S. § 1A-1, Rule 8(c) ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."). The question before us, then, is whether allegations in a defendant's counterclaims, which in part state in the affirmative mere denials of allegations originally made in a complaint, are deemed admitted if the plaintiff fails to re-allege those facts in a reply by denying the defendant's allegations.

This issue has not been directly addressed by our Courts. When interpreting the N.C. Rules of Civil Procedure, our Courts may look to the Federal Rules of Civil Procedure, and "decisions under [the Federal Rules of Civil Procedure] are pertinent for guidance and enlightenment as we develop the philosophy of the new rules." *Johnson v. Johnson*, 14 N.C. App. 40, 42, 187 S.E.2d 420, 421 (1972) (citations omitted).

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

Federal Rule of Civil Procedure 8(b)(6) contains the following language: “Effect of Failing to Deny. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.” Fed. R. Civ. P. 8(b)(6). This language is effectively identical to the language of our own Rule 8(d), which provides in relevant part:

Effect of failure to deny.—Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

N.C.G.S. § 1A-1, Rule 8(d) (2010).

In *Vevelstad v. Flynn*, 230 F.2d 695 (9th Cir.), *cert. denied*, 352 U.S. 827, 1 L. Ed. 2d 49 (1956), the Ninth Circuit Court of Appeals addressed the question now before us. In *Vevelstad*, the defendants in a title dispute action filed an answer which contained a section entitled “a fourth defense and counterclaim[.]” *Vevelstad*, 230 F.2d at 703. The plaintiffs did not reply to the counterclaim and the defendants argued that the failure to reply “constituted an admission of the allegations of that part of the answer.” *Id.* In affirming the trial court, the Court noted:

With respect to this we agree with the trial court that the allegations of this fourth defense and counterclaim, which were incorporated from similar allegations in the so-called third defense, were merely denials in affirmative form of the allegations of the complaint. Said the trial court: “*Obviously, by incorporating such allegations into what is denominated a defense and counterclaim, the defendant may not compel the plaintiff to repeat, in negative form in a reply, the allegations of his complaint, and hence, I conclude that the failure to file a reply in the instant case does not constitute an admission under rules 7(a) and 8(d) F.R.C.P.*” This ruling is in conformity with the express provisions of Rule 8(c), F.R.C.P. as follows: “When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.”

Id. (emphasis added). The Ninth Circuit Court of Appeals affirmed the trial court’s interpretation. *Id.* See also *Monk v. United Life &*

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

Accident Ins. Co. of Concord, N.H., 2 F.R. D. 372, 373 (E.D. Pa. 1942) (ruling that a plaintiff should not be required to “reassert the allegations of his statement of claim by way of a Reply” when a defendant merely reiterates in a “new matter” “the defenses which it has raised to plaintiff’s claim”).

We find the Ninth Circuit Court of Appeals’ interpretation persuasive and in line with the spirit of our Court’s prior decisions interpreting N.C.G.S. § 1A-1, Rule 8:

[B]ecause of our “general policy of proceeding to the merits of an action” . . . when to do so would not violate the letter or spirit of our Rules, this Court has refused to adhere strictly to Rule 8(d) in the context of a plaintiff’s failure to file a reply to a counterclaim in [*Eubanks v. Insurance Co. and Johnson v. Johnson*].

Connor v. Royal Globe Ins. Co., 56 N.C. App. 1, 5, 286 S.E.2d 810, 814 (1982) citing *Johnson*, 14 N.C. App. at 43, 187 S.E.2d at 422 (approving trial court’s decision to allow the plaintiff to present evidence in defense of the defendant’s counterclaims and later file a reply in conformity with the evidence presented); *Eubanks v. Fire Protection Life Ins. Co.*, 44 N.C. App. 224, 229, 261 S.E.2d 28, 31 (1979) (holding that where a counterclaim “seek[s] no affirmative relief other than that which would naturally flow from successful defense to plaintiff’s action[,]” no reply is required.). We hold that a plaintiff’s failure to file a reply re-asserting allegations already made in the complaint in response to averments in a defendant’s counterclaim which do no more than present “denials in affirmative form of the allegations of the complaint[,]” does not amount to an admission pursuant to N.C.G.S. § 1A-1, Rule 8(d). *Vevelstad*, 230 F.2d at 703.

In the case before us, Plaintiff alleged in his complaint that:

28. Plaintiff is a dependant spouse within the meaning of N.C. Gen. Stat. §50-16.1A who is actually and substantially in need of maintenance and support from the Defendant.

29. Defendant is a supporting spouse within the meaning of N.C. Gen. Stat. §50-16.1A who is capable of providing support to Plaintiff.

Defendant contended in her counterclaim that:

45. [Plaintiff] is not a dependent spouse of his marriage to [Defendant], and [Defendant] is not a supporting spouse of her marriage to [Plaintiff], as [Plaintiff] is underemployed and is

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

intentionally depressing his income in order to receive alimony from [Defendant]. As a result, [Plaintiff] is not entitled to post-separation support and/or alimony from [Defendant], and [Defendant] pleads this as an affirmative defense to [Plaintiff's] claims for postseparation support and/or alimony.

The trial court's order dismissing Plaintiff's alimony claim contained the following language:

FINDINGS OF FACT

...

2. [Defendant's] counterclaims alleged "[Plaintiff] is not a dependent spouse of his marriage to [Defendant], and [Defendant] is not a supporting spouse to her marriage to [Plaintiff], as [Plaintiff] is underemployed and is intentionally depressing his income in order to receive alimony from [Defendant]." [Defendant's] counterclaims sought affirmative relief in the form of child custody, child support, equitable distribution of marital and divisible property, attorneys' fees and motion for a comprehensive custody evaluation.

3. [Plaintiff] failed to file a reply to [Defendant's] counterclaims as required by the North Carolina Rules of Civil Procedure.

...

6. Pursuant to Rule 8(d) of the North Carolina Rules of Civil Procedure, the allegations of [Defendant's] counterclaims as more particularly set forth above in finding of fact No. 2 are deemed admitted and the [c]ourt finds as a fact that [Plaintiff] is not a dependent spouse of his marriage to [Defendant], and [Defendant] is not a supporting spouse of her marriage to [Plaintiff].

Based upon the foregoing findings of fact, the [c]ourt concludes as a matter of law:

CONCLUSIONS OF LAW

1. [Plaintiff] is not a "dependent spouse" of his marriage to [Defendant] as that term is defined in N.C.G.S. § 50-16.1A(2).

2. [Defendant] is not a "supporting spouse" of her marriage to [Plaintiff] as that term is defined in N.C.G.S. § 50-16.1A(5).

3. N.C.G.S. § 50-16.3A(a) provides in order for a party to be entitled to alimony, that party must be a "dependent spouse" and the

CROWLEY v. CROWLEY

[203 N.C. App. 299 (2010)]

other party must be a “supporting spouse.” Accordingly, [Plaintiff’s] claim for alimony should be dismissed.

We note that “Finding of Fact” number 6 is actually a conclusion of law.

The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment or the application of legal principles, is more properly classified a conclusion of law. Any determination reached through “logical reasoning from the evidentiary facts” is more properly classified a finding of fact.

Matter of Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). We thus treat “Finding of Fact” number 6 as a conclusion of law. See *Eakes v. Eakes*, — N.C. App. —, —, 669 S.E.2d 891, 897 (2008).

In reviewing the allegations in Plaintiff’s complaint and Defendant’s counterclaims, we find that the allegations set forth in paragraph 45 of Defendant’s counterclaims, and reiterated in finding of fact number 2 in the trial court’s order, are “merely denials in affirmative form of the allegations of the complaint.” *Vevelstad*, 230 F.2d at 703. Because we hold that a plaintiff is not required to re-allege those allegations in a complaint that have been “denied in the affirmative” by way of a counterclaim by a defendant, the trial court erred in “deem[ing] admitted” the allegations in Defendant’s counterclaim that Plaintiff was not a dependent spouse and that Defendant was not a supporting spouse. We thus reverse the trial court’s order dismissing Plaintiff’s alimony claim.

Reversed.

Judges STEELMAN and STEPHENS concur.

STATE v. CHERY

[203 N.C. App. 310 (2010)]

STATE OF NORTH CAROLINA v. RICHARD CHERY

No. COA09-515

(Filed 6 April 2010)

Appeal and Error—motion to withdraw plea—failure to show fair and just reason

The trial court did not err in a robbery case by denying defendant's motion to withdraw his no contest/*Alford* plea. Defendant failed to show that a fair and just reason existed for the withdrawal of his plea even though his co-defendant was found not guilty of all charges. Defendant voluntarily and knowingly entered into the plea agreement, and he failed to show he lacked competent counsel at any stage of the proceedings.

Appeal by defendant from judgment and order entered 3 and 15 October 2008 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 14 October 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Mary McCullers Reece, for defendant-appellant.

STEELMAN, Judge.

Where defendant has failed to show that any of the factors he asserted under *Handy* support his contention that a fair and just reason existed for the withdrawal of his plea, and our independent review of the record in this case reveals that the reason for defendant's motion was that his co-defendant was found not guilty of all charges, the trial court did not err by denying defendant's motion to withdraw his plea.

I. Factual and Procedural Background

Richard Chery (defendant) was a Marine stationed at Camp Lejeune. At approximately 9:00 p.m. on 22 June 2007, defendant met his girlfriend Sabrina Ezzell (Ezzell), and his friends Consalvy Jean (Jean), Bryan Weixler (Weixler), and Mohammed Zghari (Zghari) to go to several night clubs. Defendant, Ezzell, and Jean rode in defendant's vehicle (Lexus), while Zghari and Weixler rode in Zghari's vehicle (Sebring).

While defendant drove down Highway 17, he merged into a lane and cut in front of another vehicle. The vehicle had to brake sud-

STATE v. CHERY

[203 N.C. App. 310 (2010)]

denly to avoid a collision and followed defendant to a Circle K gas station. Defendant and Zghari decided to follow the other vehicle after it left the Circle K. Jean was talking on the telephone to either Weixler or Zghari, and plans were made to rob the occupants of the other vehicle.

Defendant pulled along side the other vehicle, while the Sebring was directly behind it. Defendant then positioned the Lexus in front of the other vehicle. The driver of the other vehicle attempted to drive around the Lexus, but struck its rear bumper. All three vehicles stopped. Someone yelled, "My cousin got shot. My cousin got shot." Defendant did not hear any gunshots and was unsure who the shooter had been, but believed it was Weixler. Jean told defendant not to call the police. Both defendant and Zghari, and their passengers subsequently left the scene.

Defendant was charged with attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and accessory after the fact to attempted first degree murder. Jean and Weixler were also arrested and charged with various crimes.¹ Weixler was charged with attempted first degree murder. Both Jean and defendant entered into plea agreements with the State, under the terms of which they were to testify truthfully at Weixler's trial. Defendant's "Transcript of Plea," dated and signed on 27 May 2008, stated that he was pleading guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), to the charge of conspiracy to commit robbery with a dangerous weapon in exchange for an active sentence of 15 to 27 months with credit for time already served. The remainder of the charges were to be dismissed by the State. On 8 September 2008, the trial court accepted defendant's plea.² Judgment was continued until after Weixler's trial. Jean and defendant subsequently testified at Weixler's trial. The jury found Weixler not guilty of all charges.

Defendant sent a handwritten letter to Judge Jenkins dated 17 September 2008, which stated that he wanted to withdraw his plea based upon: (1) the fact that Weixler was found not guilty of all charges; (2) no robbery had ever occurred; (3) he was told that he would spend fourteen years in jail if he did not enter a plea; (4) he had

1. The record does not contain the warrants or indictments pertaining to Jean or Weixler, nor do the briefs set forth all of their charges. Zghari and Ezzell were not charged with any crimes.

2. As discussed below in Section II.B.1, it is not entirely clear whether defendant entered an *Alford* plea or a no contest plea.

STATE v. CHERY

[203 N.C. App. 310 (2010)]

already spent fifteen months in jail; and (5) the statement from the alleged victim eliminated him as a robbery suspect. On 3 October 2008, defendant's counsel filed a written motion to withdraw defendant's plea on the basis of legal innocence, lack of competent counsel at all relevant times³, confusion, and coercion. On 3 October 2008, the trial court held a hearing on defendant's motion. The motion was denied and the trial court entered judgment imposing an active sentence of 15 to 27 months with credit for time served of 469 days. Defendant appeals.

II. Motion to Withdraw Plea

In his only argument, defendant contends that the trial court erred by denying his motion to withdraw his plea on the basis that defendant showed fair and just reasons for its withdrawal. We disagree.

A. Standard of Review

Our standard of review is well-established:

In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, "the appellate court does not apply an abuse of discretion standard, but instead makes an 'independent review of the record.'" *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (citation omitted). There is no absolute right to withdraw a plea of guilty, however, a criminal defendant seeking to withdraw such a plea before sentencing is "generally accorded that right if he can show any fair and just reason." [*State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990)] (citation omitted). The defendant has the burden of showing his motion to withdraw his guilty plea is supported by some "fair and just reason." *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992).

State v. Robinson, 177 N.C. App. 225, 229, 628 S.E.2d 252, 254-55 (2006). If the defendant meets his burden of showing his motion to withdraw his plea is supported by some fair and just reason, "the State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea." *Meyer*, 330 N.C. at 743, 412 S.E.2d at 342 (quotation omitted).

3. The record indicates that defendant initially retained counsel to represent him in these matters. (**R 15**). Defendant alleged that he was informed by this counsel that if he did not enter a plea he would go to jail for fourteen years. Thereafter, his first counsel withdrew and he was appointed counsel. Defendant's claim of lack of competent counsel was based solely on his first counsel's representation of the possible sentences for the crimes charged.

STATE v. CHERY

[203 N.C. App. 310 (2010)]

B. Analysis

We must first determine whether defendant has met his burden of showing that his motion to withdraw his plea is supported by some fair and just reason. In *State v. Handy*, our Supreme Court set forth “[s]ome of the factors which favor withdrawal”:

whether the defendant has asserted legal innocence, the strength of the State’s proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

Handy, 326 N.C. at 539, 391 S.E.2d at 163 (internal citations omitted). No one of these factors is determinative. *Id.* *Handy* makes it clear that this list is non-exclusive. *Id.* On appeal, defendant argues that four factors favor withdrawal in this case: (1) he pled no contest and had maintained his legal innocence; (2) the State’s proffer of evidence was not strong; (3) defendant’s first attorney explained that “he was looking at 14 years in jail if he didn’t take this plea”; and (4) that defendant filed his motion to withdraw only twelve⁴ days after it was entered. Defendant also argues that the State failed to show how it would be prejudiced by the withdrawal of the plea. We confine our analysis to those factors set out in defendant’s brief.

1. Legal Innocence

Defendant first contends that he asserted his legal innocence based upon his plea of “no contest” to the charge of conspiracy to commit robbery with a dangerous weapon and his subsequent testimony at a co-defendant’s trial that he did not agree to participate in a robbery.

At the outset, we note there is some confusion in the record as to what type of plea defendant entered. The transcript of plea states that defendant was entering an *Alford* plea, and that defendant considered it to be in his best interest to plead guilty to the charge and that he understood that his “*Alford* plea” would be treated as the equivalent of being guilty. However, the supplemental page attached to the tran-

4. At the hearing on defendant’s motion to withdraw, defense counsel asserted that twelve days had passed between the time of defendant’s plea and when he wrote the trial court requesting that the plea be withdrawn. However, defendant’s plea was accepted on 8 September 2008 and defendant’s letter to Judge Jenkins was dated 17 September 2008, which would be nine days.

STATE v. CHERY

[203 N.C. App. 310 (2010)]

script of plea states that “defendant will plead no contest to conspiracy robbery [sic] [with] dangerous weapon.” At the hearing before Judge Jenkins, defense counsel stated “[h]e’s authorized me to tender a plea of guilty, pursuant to an arrangement with the [S]tate.” The trial court asked defendant if he understood that he was pleading guilty to the charge of conspiracy to commit robbery with a dangerous weapon. Defendant responded “Yes, sir.” Defendant then stated that he was personally pleading guilty. The trial court then inquired into whether this was a no contest plea. Defense counsel then confirmed that it was a no contest plea.

Thus, the record is muddled as to whether defendant entered a no contest plea or a guilty plea pursuant to *Alford*. However, we hold that for purposes of our analysis in the instant case that there is no material difference between a no contest plea and an *Alford* plea. See *State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (“[A]n ‘*Alford* plea’ constitutes a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea.” (quotation and citation omitted)); see also *Alford*, 400 U.S. at 37, 27 L. Ed. 2d at 171 (stating that there is no “material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence . . .”). A defendant enters into an *Alford* plea when he proclaims he is innocent, but “intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.” *Id.* Implicit in a plea of no contest is the recognition that although the defendant is unwilling to expressly admit guilt, he is faced with “grim alternatives” and is willing to waive his trial and accept the sentence. *Id.* at 36, 27 L. Ed. 2d at 171.

As one of the bases for his motion to withdraw his plea, defendant relies heavily upon the fact that he entered a no contest/*Alford* plea rather than pleading guilty to the conspiracy charge. In his brief, defendant makes a bald assertion that his plea, in and of itself, equated to a conclusive assertion of innocence. Defendant has cited no authority or provided any sort of analysis to support his position. Further, our research has revealed no North Carolina case that has specifically addressed how this distinction impacts our analysis of an attempted withdrawal of a plea under *Handy*. See *State v. Salvetti*, — N.C. App. —, —, 687 S.E.2d 698, — (2010) (noting that the defendant entered an *Alford* guilty plea, which does not require an admission of guilt, but with no analysis as to how this impacts the assertion of innocence factor under *Handy*). Because

STATE v. CHERY

[203 N.C. App. 310 (2010)]

defendant has cited no authority for his position and this Court has found none, this argument is rejected. *State v. Taylor*, 337 N.C. 597, 614, 447 S.E.2d 360, 371 (1994); N.C.R. App. P. 28(b)(6). We hold the fact that the plea that defendant seeks to withdraw was a no contest or an *Alford* plea does not conclusively establish the factor of assertion of legal innocence for purposes of the *Handy* analysis.

Defendant was not precluded from offering other evidence that he has made an assertion of legal innocence. In the instant case, defendant has failed to do so. Defendant points to his testimony at Weixler's trial that he "did not agree to take part in any robbery." However, any subsequent testimony is negated by the fact that defendant stipulated to the factual basis of the plea and argued for a mitigated range sentence on the basis that he had accepted responsibility for his criminal conduct. N.C. Gen. Stat. § 15A-1340.16(e)(15). Defendant has failed to show that this factor weighs in favor of withdrawal.

2. Strength of the State's Proffer of Evidence

Defendant also contends that the State's proffer of evidence was not strong based upon the fact that Weixler was acquitted on all charges and that the jury in Weixler's trial found that no robbery had actually occurred. We disagree.

We must view the State's proffer based upon what was presented to the court at the plea hearing on 8 September 2008, and not based upon what occurred at the subsequent trial of co-defendant Weixler. We again note that defendant did not contest the State's proffer of a factual basis for the plea at the hearing. At sentencing, defendant argued for a mitigated range sentence based upon the fact that he had accepted responsibility for his criminal conduct.

The State's uncontested proffer of the factual basis for defendant's plea was as follows:

At some point, a decision was made to follow Mr. Boone's car. Mr. Chery followed the car, as well as a car containing Mr. Zghari and Mr. Weixler. At some point, a decision was made to rob the victims in the car that they were following. There was a phone conversation going back and forth between the cars, between Consalvy Jean, who was riding in Mr. Chery's car and Mr. Weixler. The plan was made for Mr. Chery to block off—come around and block off the victim, and they were going to hem him in, and Mr.

STATE v. CHERY

[203 N.C. App. 310 (2010)]

Chery did that. The victim, however, got away before they could complete their plan to rob the victim.

Unfortunately, the other car came alongside and shot Mr. Boone. There was a shot fired by Bryan Weixler, as the state contends, and he was injured, as a result of that.

We hold that the State's uncontested proffer of the factual basis was strong, and that the outcome of Weixler's trial is irrelevant to our consideration of this factor.

3. Voluntariness of Plea and Competent Counsel

Defendant contends that he had "inadequate consultation" with his original counsel and only entered the plea agreement based upon counsel's assertion that "he would go to jail for fourteen years (14) if he did not take a plea." Defendant's argument implicates both the voluntariness of his plea and the competency of his counsel.

a. N.C. Gen. Stat. § 15A-1022

"A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury. Our legislature has sought to insure that such pleas are entered into voluntarily and as a product of informed choice." *State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980) (citation omitted). N.C. Gen. Stat. § 15A-1022(a) and (b) (2007) set forth the requirements the trial court must comply with before accepting a plea of guilty or no contest.

The transcript of defendant's plea hearing shows the trial court complied with all of these requirements. Defendant stated that he and his current counsel had discussed the nature of the charges against him and any possible defenses. Defendant understood that by entering a plea he was waiving valuable constitutional rights and that he understood the maximum sentence for the crime charged. Defendant further stated that no one had promised him anything or threatened him to cause him to enter the plea, and that he fully understood what he was doing. Defendant voluntarily and knowingly entered into the plea agreement.

b. Competency of Counsel

Defendant concedes in his brief that a sentence of fourteen years was "within the realm of possibility[.]" In addition, the trial court found at the hearing on defendant's motion to withdraw his plea that

STATE v. CHERY

[203 N.C. App. 310 (2010)]

the potential sentence for defendant, if found guilty of all the charges brought against him and if the sentences were imposed consecutively, would have equaled more than fourteen years.

This contention is based upon alleged misrepresentations by his original retained counsel and not upon any misrepresentation by his appointed counsel that represented defendant at the time of the plea and subsequent motion to withdraw the plea. The record is unclear as to when defendant discharged his first counsel. The record does reveal that defendant was arrested on 23 June 2007, that the State made the plea offer on 17 March 2008, that defendant and his subsequent counsel signed the plea transcript on 27 May 2008, and that the plea was accepted by the court on 8 September 2008. It strains the credulity of this Court that an alleged misrepresentation made at a minimum of five months before the plea hearing, and probably much earlier than that, had any bearing on defendant's decision to enter a guilty plea in this matter. Defendant has failed to demonstrate that his plea was not entered voluntarily or that he lacked competent counsel at any stage of these proceedings.

4. Length of Time Between Entry of the Plea
and Desire to Change It

Defendant contends that the length of time in between the entry of his plea and his motion to withdraw “was not long” and “was not a strong factor against his withdrawing the plea.”

Our appellate courts have “placed heavy reliance on the length of time between a defendant's entry of the guilty plea and motion to withdraw the plea.” *Robinson*, 177 N.C. App. at 229, 628 S.E.2d at 255 (citations omitted). The reasoning behind this reliance was articulated in *Handy*:

A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

326 N.C. at 539, 391 S.E.2d at 163 (quotation omitted). In *Handy*, the defendant informed his attorney that he desired to withdraw his guilty plea less than twenty-four hours after its entry. *Id.* at 540, 391 S.E.2d at 163. Our Supreme Court held that the defendant “clearly

STATE v. CHERY

[203 N.C. App. 310 (2010)]

made a prompt and timely motion to withdraw his plea of guilty.” *Id.*; *contra State v. Davis*, 150 N.C. App. 205, 206–08, 562 S.E.2d 590, 592–93 (2002) (affirming the denial of the defendant’s motion to withdraw his plea made seven days after its entry).

In the instant case, the record shows that on 27 May 2008, defendant, defense counsel, and the prosecutor signed a “Transcript of Plea” in which he indicated that he would enter an *Alford* plea. On 8 September 2008, the trial court accepted defendant’s plea. Although defendant’s letter seeking to withdraw his plea was sent to Judge Jenkins only nine days after its entry, the facts of this case do not show that this desire was based upon “[a] swift change of heart” as contemplated by *Handy*. Defendant executed the plea transcript approximately three and a half months prior to the plea hearing. There is no indication in the record that during this time defendant wavered on this decision. It was only after Weixler was found not guilty of all charges did defendant decide that he wished to withdraw his plea. Defendant has not shown that this factor weighs in favor of withdrawal. Defendant has failed to show that any of the factors he asserted support his contention that a fair and just reason existed to support the withdrawal of his plea.

5. Prejudice to the State

Our appellate courts have clearly established that the burden does not shift to the State to show prejudice until the defendant has established a fair and just reason existed to withdraw his plea. *See Meyer*, 330 N.C. at 743, 412 S.E.2d at 342 (“After a defendant has come forward with a ‘fair and just reason’ in support of his motion to withdraw, the State may refute the movant’s showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea.” (quotation omitted)); *State v. Villatoro*, 193 N.C. App. 65, 75, 666 S.E.2d 838, 845 (2008) (“As defendant has failed to show a ‘fair and just reason’ for withdrawal of his guilty plea, we need not address whether the State would be prejudiced by defendant’s withdrawal.” (citation omitted); *State v. Hatley*, 185 N.C. App. 93, 101, 648 S.E.2d 222, 227 (2007) (“[W]e only reach the question of substantial prejudice to the State if defendant has carried his burden of proof that a ‘fair and just’ reason supports his motion to withdraw.” (citation omitted)). Because defendant has failed to meet his burden of showing a fair and just reason existed to withdraw his plea, we do not address prejudice against the State.

STATE v. McRAE

[203 N.C. App. 319 (2010)]

III. Conclusion

Defendant has failed to show that any of the factors that he asserted under *Handy* support his contention that a fair and just reason existed to support the withdrawal of his plea. Our independent review of the record in this case reveals that the reason for defendant's motion to withdraw his plea was that his co-defendant, Weixler, was found not guilty of all charges. This is not a proper factor for consideration under *Handy*. The trial court properly denied defendant's motion to withdraw his plea.

AFFIRMED.

Judges ELMORE and HUNTER, JR., Robert N. concur.

STATE OF NORTH CAROLINA v. RICHARD LENE McRAE, DEFENDANT

No. COA09-114

(Filed 6 April 2010)

Search and Seizure—motion to suppress—reasonable suspicion—traffic violation—informant tip

The trial court did not err in a drugs case by denying defendant's motion to suppress evidence obtained as a result of a traffic stop. An officer had the required reasonable suspicion to stop defendant based on his observation of defendant committing a traffic violation, and alternatively, based on a tip received from a reliable confidential informant.

Appeal by defendant from order entered 18 September 2007 by Judge Thomas H. Lock and judgment entered 23 June 2008 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 10 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Irving Joyner for defendant-appellant.

GEER, Judge.

Defendant Richard Lene McRae appeals from the trial court's denial of his motion to suppress evidence obtained as a result of a

STATE v. McRAE

[203 N.C. App. 319 (2010)]

traffic stop, contending that the officer who stopped him did not have the reasonable suspicion necessary under the Fourth Amendment to support the stop. We hold that the officer had the required reasonable suspicion based on the officer's observation of defendant's committing a traffic violation and, alternatively, based on a tip received from a reliable, confidential informant. We, therefore, affirm the denial of the motion to suppress.

Facts

On 5 December 2005, Lieutenant Supervisor Charlie Revels of the Robeson County Sheriff's Department received a tip from a confidential source that an older black male named Richard McRae would that day be driving a green Grand Am with over 60 grams of cocaine within the city limits of Pembroke, North Carolina. The source had previously provided reliable information leading to several felony arrests. Lieutenant Revels sent out a dispatch advising all officers to be on the lookout for a black male driving a green Grand Am within the Pembroke city limits.

At approximately 6:30 that evening, Officer Shawn Clark, who had heard the dispatch, was stopped at an intersection in Pembroke when a green Grand Am driven by a black male passed by him. Officer Clark turned and followed directly behind the car for about 100 feet. At that point, the Grand Am turned right into a Texaco gas station and convenience store parking lot without using his turn signal. There was a medium level of traffic in the area. The Grand Am pulled up to the gas pump, and the driver got out of the car.

Officer Clark pulled in behind the Grand Am, got out of his car, and asked the driver of the Grand Am, whom he later identified as defendant, to have a seat in Officer Clark's car. Officer Clark told defendant that he had failed to signal while turning. As defendant started to walk to the passenger door of Officer Clark's car, Officers Cisco and Davis pulled up. As defendant opened the door of Officer Clark's car, he saw the two other officers and took off running. Officer Clark chased defendant towards the back of the store. As defendant was running, he took off his jacket and threw it on the ground.

About five or 10 minutes later, Officer Clark caught up to defendant in the parking lot of a nearby restaurant and placed him under arrest. Lieutenant Revels then arrived and as Officer Clark was patting defendant down, Lieutenant Revels asked defendant why he had

STATE v. McRAE

[203 N.C. App. 319 (2010)]

been running. Defendant said, "Man, they got it." Lieutenant Revels asked, "Got what?" Defendant replied, "[t]he jacket." When defendant's jacket was recovered, officers found a substance that was later determined to be 56.1 grams of cocaine. Defendant was charged with resisting a public officer, two counts of possession with the intent to sell and deliver cocaine, trafficking in cocaine by transportation, trafficking in cocaine by possession, possession of marijuana, and two counts of possession of drug paraphernalia.

On 17 July 2007, defendant moved to suppress all evidence discovered in the search and the statements he made when apprehended. The trial court granted the motion to suppress as to the statements, concluding that defendant was in police custody and had not been advised of his *Miranda* rights when Lieutenant Revels asked him why he ran. The trial court denied the motion as to the cocaine in defendant's jacket on the grounds that Officer Clark had reasonable suspicion to stop defendant.

On 23 June 2008, defendant pled guilty to the charges, reserving his right to appeal the denial of his motion to suppress. He was sentenced to 35 to 42 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant's only contention on appeal is that the trial court erred in denying his motion to suppress because Officer Clark stopped him in violation of his Fourth Amendment rights. When this Court reviews a trial court's ruling on a motion to suppress, the trial court's findings of fact are binding on appeal if they are supported by competent evidence. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). "However, the trial court's conclusions of law are fully reviewable on appeal." *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003).

Under the Fourth Amendment, police are permitted to conduct a brief investigatory stop of a vehicle if "an officer [has] reasonable and articulable suspicion of criminal activity." *State v. Hughes*, 353 N.C. 200, 206-07, 539 S.E.2d 625, 630 (2000). Our Supreme Court has explained that "[r]easonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576, 120 S. Ct. 673, 675-76 (2000)).

STATE v. McRAE

[203 N.C. App. 319 (2010)]

A court, in determining whether an officer had reasonable suspicion, looks at the totality of the circumstances. *Id.* “The only requirement is a minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’” *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581, 1585 (1989)). The reasonable suspicion must, however, arise from “the officer’s knowledge prior to the time of the stop.” *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631.

Defendant first contends that the trial court erred in concluding that his failure to use his turn signal in violation of N.C. Gen. Stat. § 20-154(a) (2009) justified the stop. That statute provides in pertinent part that “[t]he driver of any vehicle upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and . . . whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.” *Id.*

In arguing that no violation of § 20-154(a) occurred, defendant relies upon our Supreme Court’s decision in *State v. Ivey*, 360 N.C. 562, 562, 633 S.E.2d 459, 460 (2006). In *Ivey*, the Court held that the duty under § 20-154(a) to use a turn signal does not arise unless, as the statute states, another vehicle may be affected by the turn. 360 N.C. at 565, 633 S.E.2d at 461. As a result, an officer may not make an investigatory stop of a vehicle for failing to use a turn signal “unless a reasonable officer would have believed that defendant’s failure to use his turn signal at this intersection might have affected the operation of another vehicle . . .” *Id.*

The Court held in *Ivey* that the officer’s stop and subsequent search in that case were unconstitutional because:

The record does not indicate that any other vehicle or any pedestrian was, or might have been, affected by the turn. Therefore, the only question is whether Officer Rush’s vehicle may have been affected by the turn. Officer Rush was traveling at some distance behind the sport utility vehicle and observed defendant come to a complete stop at the stop sign. Defendant then turned right, the only legal movement he could make at the intersection. Regardless of whether defendant used a turn signal, Officer Rush’s vehicle would not have been affected. Officer Rush’s only option

STATE v. McRAE

[203 N.C. App. 319 (2010)]

was to stop at the intersection. Accordingly, Officer Rush's vehicle could not have been affected by defendant's maneuver.

Id., 633 S.E.2d at 461-62.

Subsequent to *Ivey*, the Supreme Court decided *Styles*, 362 N.C. at 414, 665 S.E.2d at 439, in which the Court held that a violation of N.C. Gen. Stat. § 20-154(a) could be sufficient to provide an officer with reasonable suspicion to stop a driver. The Court concluded that reasonable suspicion existed when the defendant switched lanes on a highway without using his turn signal, and the defendant's car was immediately in front of the officer's patrol car. 362 N.C. at 416-17, 665 S.E.2d at 441. A violation of N.C. Gen. Stat. § 20-154(a) occurred "because it is clear that changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle." 362 N.C. at 417, 665 S.E.2d at 441. As a result, the officer's observation of the failure to use a turn signal "gave him the required reasonable suspicion to stop defendant's vehicle." *Id.*

The facts of this case are more similar to those of *Styles* than those of *Ivey*. No vehicle could have been affected by the turn in *Ivey* since the driver was stopped at a stop sign and could only turn right, and the officer behind the defendant was also required to stop at the stop sign after the defendant's unsignaled turn. In this case, however, as in *Styles*, defendant was traveling, before his turn, in a through lane with "medium" traffic and was a short distance in front of the police officer. The trial court did not err in concluding that a reasonable officer would have believed, under these circumstances, that the failure to use a turn signal could have affected another motor vehicle. Accordingly, the officer had reasonable suspicion to stop defendant based on his failure to use his turn signal.

Additionally, we hold that the tip from the confidential informant was sufficient to provide reasonable suspicion justifying the stop. We look not only at the information possessed by Officer Clark, but also that known to Lieutenant Revels. As this Court has explained:

If the officer making the investigatory stop (the second officer) does not have the necessary reasonable suspicion, the stop may nonetheless be made if the second officer receives from another officer (the first officer) a request to stop the vehicle, and if, at the time the request is issued, the first officer possessed a reasonable suspicion that criminal conduct had occurred, was occurring, or was about to occur.

STATE v. McRAE

[203 N.C. App. 319 (2010)]

State v. Battle, 109 N.C. App. 367, 370-71, 427 S.E.2d 156, 159 (1993). Thus, if the tip from the confidential informant provided Lieutenant Revels with reasonable suspicion to stop defendant, then Officer Clark could lawfully stop defendant.

Defendant, in arguing that the informant's tip was insufficient, overlooks the fact that the tip in this case came from a reliable, confidential informant rather than from an anonymous source. The State presented evidence and the trial court found that the confidential informant had worked with Lieutenant Revels on several occasions and had provided reliable information in the past that led to the arrest of drug offenders.

The United States Supreme Court has specifically held that a tip from an informant "known to [the officer] personally and [who] had provided him with information in the past" is sufficient to provide reasonable suspicion for a stop. *Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617, 92 S. Ct. 1921, 1923 (1972). *See also Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309, 110 S. Ct. 2412, 2416 (1990) (observing that "reasonable suspicion can arise from information that is less reliable than that required to show probable cause" and noting that, in *Adams*, the Court had reasoned that "the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a *Terry* stop"); *State v. Morton*, 363 N.C. 737, 738, 686 S.E.2d 510, 510, adopting *per curiam*, 198 N.C. App. 206, 217, 679 S.E.2d 437, 445 (2009) (Hunter, J., dissenting) (holding that "the detectives in this case had reasonable suspicion to believe defendant could be armed based solely on the confidential informant's tip that defendant was involved in a recent drive-by shooting and was wearing gang colors"); *State v. Downing*, 169 N.C. App. 790, 794-95, 613 S.E.2d 35, 38 (2005) (concluding that reasonable suspicion to stop defendant's vehicle existed when previously-proven confidential informant told police defendant would be transporting cocaine that day, defendant was driving vehicle that matched description given by informant, tag numbers on vehicle were registered to defendant, defendant was driving on suspected route, and defendant crossed into county at approximate time informant had indicated).

Moreover, our courts have held that a tip from a reliable, confidential informant may supply probable cause—a standard higher than reasonable suspicion. Thus, in *State v. Green*, 194 N.C. App. 623, 624, 670 S.E.2d 635, 636, *aff'd per curiam*, 363 N.C. 620, 683 S.E.2d 208 (2009), this Court concluded that probable cause existed

STATE v. McRAE

[203 N.C. App. 319 (2010)]

to search the defendant, who was driving a brown Durango with South Carolina license plates towards Wilmington, based on a tip from a reliable, confidential informant that an older black male named “Junior,” driving an older model Mercedes or mid-size SUV, possibly brown in color, would be leaving from Charleston in about 30 minutes to deliver heroin to the informant in Wilmington. *See also State v. Leach*, 166 N.C. App. 711, 716, 603 S.E.2d 831, 835 (2004) (“A known informant’s information may establish probable cause based upon a reliable track record in assisting the police.”), *appeal dismissed*, 359 N.C. 640, 614 S.E.2d 538 (2005).

Here, the reliable, confidential informant gave even more specific information than that supplied in *Green*. He identified defendant by name—a name that Lieutenant Revels recognized as someone associated with the drug trade. The informant also described the specific car—a green Grand Am—rather than providing a general type of car, and he advised Lieutenant Revels that defendant would be driving the car within the city limits of Pembroke with 60 grams of cocaine in his possession. We hold that this tip from a proven, confidential informant was sufficient to provide reasonable suspicion to stop defendant.

Defendant, however, points to *Hughes* and *McArn*. In each of those cases, the courts were applying the anonymous tip standard rather than considering a tip from a proven, confidential informant. While, in *Hughes*, an officer had asserted that the informant was reliable, “[t]here was no indication that the informant had been previously used and had given accurate information . . .” *Hughes*, 353 N.C. at 204, 539 S.E.2d at 628. The Court, therefore, treated the tip as one from an anonymous informant. *Id.* at 208, 539 S.E.2d at 631.

As this Court stressed in *State v. Nixon*, 160 N.C. App. 31, 34, 584 S.E.2d 820, 822 (2003), “[t]he difference in evaluating an anonymous tip [as opposed to a reliable, confidential informant’s tip] is that the overall reliability is more difficult to establish, and thus some corroboration of the information or greater level of detail is generally necessary.” Because this case involves a reliable, confidential informant, neither *Hughes* nor *McArn* is applicable. The trial court, therefore, did not err in determining that the officer had reasonable suspicion to stop defendant and did not err in denying the motion to suppress the evidence found in the search.

No error.

Judges ROBERT C. HUNTER and STEELMAN concur.

STATE v. PHILLIPS

[203 N.C. App. 326 (2010)]

STATE OF NORTH CAROLINA v. ROBERT WAYNE PHILLIPS, DEFENDANT

No. COA09-1105

(Filed 6 April 2010)

Sexual Offenses— satellite-based monitoring—finding of aggravated offenses—error

The trial court erred in finding that defendant's convictions for taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1 and felonious child abuse by the commission of any sexual act pursuant to N.C.G.S. § 14-318.4(a2) were "aggravated offenses" as defined in N.C.G.S. § 14-208.6(1a). Thus, the trial court erred in ordering defendant to enroll in a lifetime satellite-based monitoring program.

Appeal by defendant from order entered 8 June 2009 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 9 February 2010.

Roy Cooper, Attorney General, by Joseph Finarelli, Assistant Attorney General, for the State.

Richard Croutharmel, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Robert Wayne Phillips appeals from the trial court's order requiring him to enroll in a satellite-based monitoring program for the duration of his natural life. Because defendant was not convicted of an "aggravated offense" as defined in N.C.G.S. § 14-208.6(1a), we must reverse the trial court's order.

Defendant was charged with the following offenses: first-degree rape of a child under the age of 13 years in violation of N.C.G.S. § 14-27.2(a)(1); first-degree sexual offense of a child under the age of 13 years in violation of N.C.G.S. § 14-27.4(a)(1); taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1; contributing to the delinquency of a juvenile in violation of N.C.G.S. § 14-316.1; and felonious child abuse by the commission of any sexual act in violation of N.C.G.S. § 14-318.4(a2). Defendant entered pleas of guilty to felonious child abuse by the commission of any sexual act in violation of N.C.G.S. § 14-318.4(a2) and taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1; the remaining charges of first-degree rape and first-degree sexual offense

STATE v. PHILLIPS

[203 N.C. App. 326 (2010)]

of a child and contributing to the delinquency of a juvenile were dismissed pursuant to defendant's plea agreement.

The factual basis for defendant's plea was presented by the State without objection and with defendant's consent. According to this uncontested recitation of the facts, in January 2007, defendant was living with his girlfriend and her children, including her 10-year-old daughter, R.B. According to the State, although R.B. "had indicated it had happened more than once," R.B. reported that, on 9 January 2007, the then-44-year-old defendant raped and sexually abused her. According to the State:

[R.B.] stated that on this night that this defendant came into her room and, as she told officers initially at the spot, put his penis inside her privates as she pointed to her genitalia. When they asked her to be a little more specific about what occurred, she stated she was on her bed in her room when this defendant came into her room, started messing with her last night. This being talked about on the 10th of January. The defendant made her get on the floor near her window, pull her shorts and her underwear off. He then put his penis inside her and was moving around inside her. He pulled his penis out of her and some white stuff came out. Said that he caught the white stuff in his hand.

R.B. was examined at the Teddy Bear Clinic and was found to have "a healed transaction at 8 o'clock to the base of [her] hymen which is evidence of prior penetrating trauma which they said will be consistent with [R.B.'s] allegation of sexual abuse."

The trial court sentenced defendant to an active term of imprisonment for a minimum of 25 months and a maximum of 39 months. Defendant was thereafter notified by the North Carolina Department of Correction that he was required to register as a sex offender upon his release from prison. On 8 June 2009, the trial court conducted a hearing to determine whether defendant was also required to submit to a satellite-based monitoring ("SBM") program. The trial court determined that defendant had been convicted of one or more "aggravated offenses" as defined in N.C.G.S. § 14-208.6(1a), and so ordered defendant to enroll in a lifetime SBM program. Defendant gave notice of appeal from the trial court's order.

Defendant contends the trial court erred when it found that his convictions of the offenses of taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1 and felonious child abuse by the com-

STATE v. PHILLIPS

[203 N.C. App. 326 (2010)]

mission of any sexual act pursuant to N.C.G.S. § 14-318.4(a2) are “aggravated offenses” as defined in N.C.G.S. § 14-208.6(1a), and that the trial court erred when it ordered him to enroll in a lifetime SBM program upon such findings.

The sex offender monitoring program set forth in Article 27A of the North Carolina General Statutes is “designed to monitor three categories of offenders,”¹ one of which includes those offenders who are “convicted of an aggravated offense as . . . defined in [N.C.G.S. §] 14-208.6.” *See* N.C. Gen. Stat. § 14-208.40(a)(1) (2009). As used in this Article, an “aggravated offense” is “any criminal offense that includes either”: (i) “engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence”; or (ii) “engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.” N.C. Gen. Stat. § 14-208.6(1a) (2009); *see State v. Davison*, — N.C. App. —, —, S.E.2d —, —, (Dec. 8, 2009) (No. COA09-212) (“[I]t is clear that an ‘aggravated offense’ is an offense including: first, a sexual act involving vaginal, anal or oral penetration; and second, either (1) that the victim is less than twelve years old or (2) the use of force or the threat of serious violence against a victim of any age.”). When a trial court makes a determination, either pursuant to the procedures set forth in N.C.G.S. §§ 14-208.40A or 14-208.40B, that a conviction offense is an “aggravated offense,” the General Assembly has provided that the trial court “shall order the offender to enroll in [a] satellite-based monitoring [program] for life.” *See* N.C. Gen. Stat. §§ 14-208.40A(c), 14-208.40B(c) (2009).

In *State v. Davison*, — N.C. App. —, —, S.E.2d — (Dec. 8, 2009) (No. COA09-212), this Court considered whether the trial court properly determined that a defendant convicted of attempted first-degree sex offense and of taking indecent liberties with a child had committed “aggravated offenses” when the court based its determination in part upon the defendant’s “recitation of the underlying facts giving rise to his convictions.” *See Davison*, — N.C. App. at —, —, S.E.2d at —. After reviewing the language of the statutes at issue, this Court held that the General Assembly’s “repeated use of the term ‘conviction’ ” compelled the conclusion that the trial court “is only to consider *the elements of the offense of which a defendant was con-*

1. At the time defendant committed the offenses in the underlying case, North Carolina’s SBM program monitored two categories of offenders, both of which are still among the now-three categories of offenders monitored by the program. *See* N.C. Gen. Stat. § 14-208.40(a) (2009); 2008 N.C. Sess. Laws 426, 435, ch. 117, § 16; 2006 N.C. Sess. Laws 1065, 1074-75, ch. 247, § 15(a).

STATE v. PHILLIPS

[203 N.C. App. 326 (2010)]

victed and is not to consider the underlying factual scenario giving rise to the conviction” when determining whether a defendant’s “conviction offense [i]s an aggravated offense” under the procedures set forth in N.C.G.S. § 14-208.40A. *Davison*, — N.C. App. at —, —, S.E.2d at — (emphasis added). Shortly after *Davison* was decided, this Court applied this same rule when determining whether a defendant’s conviction offense was an “aggravated offense” under the procedures set forth in N.C.G.S. § 14-208.40B. *See State v. Singleton*, — N.C. App. —, —, S.E.2d —, —, (Jan. 5, 2010) (No. COA09-263). Thus, in order for a trial court to conclude that a conviction offense is an “aggravated offense” under the procedures of either N.C.G.S. §§ 14-208.40A or 14-208.40B, this Court has determined that the elements of the conviction offense must “fit within” the statutory definition of “aggravated offense.” *See Singleton*, — N.C. App. at —. —, S.E.2d at —.

In *Davison*, this Court concluded that the elements of the offense of indecent liberties with a child under N.C.G.S. § 14-202.1(a) “requires none of the . . . factors required by the definition of an ‘aggravated offense’ ” and, therefore, determined that the offense of indecent liberties with a child could not sustain the trial court’s determination that the defendant was convicted of an “aggravated offense.” *See Davison*, — N.C. App. at —, —, S.E.2d at —. Consequently, in the present case, we must also conclude that defendant’s conviction of the offense of taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1 is not an “aggravated offense” and that any determination by the trial court to the contrary was in error. Therefore, we need only determine whether the trial court could properly conclude that defendant’s conviction of the offense of felonious child abuse by the commission of any sexual act under N.C.G.S. § 14-318.4(a2) is an “aggravated offense” as defined in N.C.G.S. § 14-208.6(1a).²

2. In *Davison*, the Court opined: “The State argues that, should we limit the trial court’s examination to the elements of the offense, we would render only four crimes ‘aggravated offenses’ for the purpose of this statute. We are aware of this limitation, but we are bound by principles of statutory interpretation and we must not enter the realm of the General Assembly to extend the scope of the statute.” *See Davison*, — N.C. App. at —, —, S.E.2d at —. The four offenses that the State asserted could be “aggravated” under the “limitation” of an elements-based approach were: first-degree rape under N.C.G.S. § 14-27.2; second-degree rape under N.C.G.S. § 14-27.3; first-degree sexual offense under N.C.G.S. § 14-27.4; and second-degree sexual offense under N.C.G.S. § 14-27.5. However, since the *Davison* Court did not examine any of these four offenses under the rule of that case, we do not believe that this *dicta* should be deemed to control which conviction offenses are “aggravated offenses,” and so undertake our analysis of whether the elements of the conviction offense of felonious child abuse by

STATE v. PHILLIPS

[203 N.C. App. 326 (2010)]

N.C.G.S. § 14-318.4(a2) provides: “Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class E felony.” N.C. Gen. Stat. § 14-318.4(a2) (2009). Consequently, “[t]he essential elements of felonious child abuse under subsection (a2) are (1) the defendant is a parent or legal guardian of (2) a child less than 16 years of age, (3) who commits or allows the commission of *any sexual act* upon that child.” *State v. Lark*, — N.C. App. —, —, 678 S.E.2d 693, 700 (2009) (emphasis added), *disc. review denied*, — N.C. —, —, S.E.2d — (Jan. 28, 2010) (No. 325P09). In comparison, the statutory definition of “aggravated offense” requires that the offender (1) “engag[e] in a sexual act involving vaginal, anal, or oral penetration” (2) “with a victim of any age through the use of force or the threat of serious violence . . . [or] with a victim who is less than 12 years old.” N.C. Gen. Stat. § 14-208.6(1a).

Thus, as defendant asserts in his brief and as the State concedes, an offender’s conviction of felonious child abuse under N.C.G.S. § 14-318.4(a2) *may or may not* be a conviction which results from the commission of “a sexual act involving . . . penetration,” which is required for an offense to be considered an “aggravated offense” under N.C.G.S. § 14-208.6(1a). In other words, without a review of “the underlying factual scenario giving rise to the conviction,” which is prohibited under *Davison*, *see Davison*, — N.C. App. at —, —, S.E.2d at —, a trial court could not know whether an offender was convicted under N.C.G.S. § 14-318.4(a2) because he committed a sexual act involving penetration. In addition, while an “aggravated offense” is an offense in which the offender has “engag[ed] in” a specific type of sexual act, an offender may be convicted of felonious child abuse by the commission of any sexual act as a result of either “commit[ting]” any sexual act upon a child less than 16 years of age, *or* as a result of “*allow[ing] the commission*” of any sexual act upon

the commission of any sexual act fits within the statutory definition of “aggravated offense.” *Compare* N.C. Gen. Stat. §§ 14-27.2(a)(1), 14-27.4(a)(1) (2009) (providing that an offender can be convicted of first-degree rape and first-degree sexual offense of a child when the victim is “under the age of 13 years”), *with* N.C. Gen. Stat. § 14-208.6(1a) (providing that, for an offense to be an “aggravated offense,” the victim must be “less than 12 years old”); *compare* N.C. Gen. Stat. §§ 14-27.3(a)(2), 14-27.5(a)(2) (2009) (providing that an offender can be convicted of second-degree rape and second-degree sexual offense against a victim “[w]ho is mentally disabled, mentally incapacitated, or physically helpless” where the offender knows or “should reasonably know” that the victim is such), *with* N.C. Gen. Stat. § 14-208.6(1a) (providing that, for an offense to be an “aggravated offense,” it must be committed against either (1) a victim “who is less than 12 years old,” or (2) a victim of any age “through the use of force or the threat of serious violence”).

STATE v. PHILLIPS

[203 N.C. App. 326 (2010)]

such a child. *See* N.C. Gen. Stat. § 14-318.4(a2). Thus, by examining the elements of the offense alone, a trial court could not determine whether a person convicted of felonious child abuse by the commission of any sexual act necessarily “engag[ed] in” a specific type of sexual act *himself*. Further, if an offense does not involve engaging in a sexual act through the use of force or threat of serious violence, the offense can only be found to be an “aggravated offense” if it involves engaging in sexual acts involving penetration “with a victim who is less than 12 years old.” *See* N.C. Gen. Stat. § 14-208.6(1a). However, felonious child abuse by the commission of any sexual act provides that the victim must be “a child less than 16 years of age.” *See* N.C. Gen. Stat. § 14-318.4(a2). Since “a child less than 16 years” is not necessarily also “less than 12 years old,” without looking at the underlying facts, a trial court could not conclude that a person convicted of felonious child abuse by the commission of any sexual act committed that offense against a child less than 12 years old. Therefore, in light of our review of the plain language of the statutes at issue, we must conclude that the trial court erred when it determined that defendant’s conviction offense of felonious child abuse by the commission of any sexual act under N.C.G.S. § 14-318.4(a2) is an “aggravated offense” as defined under N.C.G.S. § 14-208.6(1a) because, when considering the elements of the offense *only* and not the underlying factual scenario giving rise to this defendant’s conviction, the elements of felonious child abuse by the commission of any sexual act do not “fit within” the statutory definition of “aggravated offense.” *See Singleton*, — N.C. App. at —, —, S.E.2d at —. Because we must conclude that defendant was not convicted of an “aggravated offense” in light of the rule in *Davison*, we must remand this matter to the trial court with instructions that it reverse its determination that defendant is required to enroll in a lifetime SBM program.

In light of our disposition, and since the trial court has already determined that defendant was neither classified as a sexually violent predator nor found to be a recidivist, we must conclude that the trial court’s order requiring defendant to register as a sex offender for the duration of his natural life is also in error. However, this opinion does not preclude the trial court from ordering, on remand, that defendant register as a sex offender “for a period of 30 years.”

Additionally, the trial court did not make findings with respect to item 5 in the “Findings” section of its order. However, the record indicates that the Department of Correction conducted a risk assessment on defendant and found that he “scored one point” and was deemed

LATO HOLDINGS, LLC v. BANK OF N.C.

[203 N.C. App. 332 (2010)]

to be “low risk.” Therefore, even though it appears that the trial court could have found that defendant committed an offense that “involve[d] the physical, mental, or sexual abuse of a minor,” since the record indicates that defendant does not “require[] the highest possible level of supervision and monitoring,” we conclude that the court cannot now order defendant to enroll in a SBM program for a period of time to be specified by the court pursuant to N.C.G.S. § 14-208.40B(c).

Reversed and remanded.

Judges JACKSON and HUNTER, JR. concur.

LATO HOLDINGS, LLC, PLAINTIFF v. BANK OF NORTH CAROLINA, DEFENDANT

No. COA09-731

(Filed 6 April 2010)

**Construction Claims—breach of contract—quantum meruit—
unlicensed general contractor**

The trial court did not err in a breach of contract and *quantum meruit* case by granting defendant’s motion for summary judgment and dismissing plaintiff’s complaint with prejudice. Plaintiff cannot recover any damages for the “grading” work performed because it was not a licensed general contractor under N.C.G.S. § 87-1.

Appeal by plaintiff and defendant from summary judgment order entered 4 March 2009 by Judge A. Moses Massey in Superior Court, Guilford County. Heard in the Court of Appeals 5 November 2009.

Richard M. Greene, for plaintiff-appellant.

Brooks Pierce McLendon Humphrey & Leonard, LLP, by Reid L. Phillips, for defendant-appellee.

STROUD, Judge.

Plaintiff and defendant appeal a summary judgment order which granted summary judgment in favor of defendant and dismissed plaintiff’s claims with prejudice. For the following reasons, we affirm.

LATO HOLDINGS, LLC v. BANK OF N.C.

[203 N.C. App. 332 (2010)]

I. Background

On 30 May 2008, plaintiff filed a verified complaint alleging the following:

1. Plaintiff is a limited liability company duly organized under the laws of the state of North Carolina with its principal place of business in Guilford County, North Carolina.

2. The Defendant is a corporation duly organized under the laws of the state of North Carolina and doing business in Guilford County, North Carolina.

3. The real property that is the subject of this lawsuit (the "Property") is a 27.844 acre tract of land located in Guilford County and more particularly described in that certain deed of trust recorded in Book 6373, Page 0075 of the Guilford County Registry.

4. At all times relevant herein the Defendant held a first deed of trust on the Property, which deed of trust is recorded in Book 6373, Page 0075 of the Guilford County Registry (the "Deed of Trust").

5. The Deed of Trust specifically granted to Defendant the right to preserve and protect its collateral should the grantor of the Deed of Trust fail to do so.

6. This action arises out of a series of agreements entered into between Plaintiff and the Defendant, acting through its duly authorized agents and representatives, Richard Calicutt and Brent Bridges, wherein Defendant contracted with Plaintiff in July 2007 to provide and furnish various labor and services The labor and services included but was not limited to site cleanup, dirt removal and replacement, and sloping and stabilization of embankments.

7. At the time that Defendant contracted with Plaintiff for the work described above, the owner of the Property, who was also the grantor under the Deed of Trust, had: i) discontinued the construction project located on the Property; ii) left the Property in a hazardous condition and in a condition that would subject the Property to fines and penalties from the City of High Point for violating environmental rules and regulations; and iii) failed to take any steps to preserve or protect the Property.

8. At the time that Defendant contracted with Plaintiff for the work described above, the Defendant had initiated foreclosure proceedings under the terms of the Deed of Trust.

9. Plaintiff commenced the work on July 26, 2007, with the knowledge, consent and at the direction of the Defendant, and duly provided the work necessary to preserve and protect the Property and to avoid being fined by the City of High Point in accordance with its agreement with Defendant.

10. On or about August 21, 2007, Plaintiff finished all of the work required under its agreement with Defendant. After the completion of the work, Defendant has failed and continues to fail to compensate Plaintiff for the work performed.

11. The total value of the work[] performed by Plaintiff is \$141,145.00.

12. Despite repeated demands, Defendant has refused and continues to refuse to pay the amounts due Plaintiff.

13. On or about October 1, 2007, Plaintiff filed a Claim of Lien (File No. 07 M 3490) with the Clerk of Court of Guilford County to secure its claim for the value of the work performed on the Property (\$141,145.00) under N.C.G.S. §44A-7 *et seq.*

14. After the filing of the Claim of Lien, Defendant purchased the Property at the foreclosure sale that it had initiated pursuant to the provisions of the Deed of Trust.

Plaintiff brought causes of action for breach of contract, quantum meruit and quantum valebant, and unfair and deceptive trade practices.

On 20 August 2008, defendant answered plaintiff's complaint alleging (1) there was no contract or (2) meeting of the minds between the parties, (3) the statute of frauds bars plaintiff's claims, (4) plaintiff had not provided anything of value to defendant, (5) various denials of plaintiff's allegations, (6) the claim of lien does not provide a sufficient description, and (7) plaintiff failed to enforce its claim of lien within 180 days. On 11 December 2008, defendant filed a motion to amend its answer because (8) plaintiff "is not a licensed general contractor[.]" On 8 January 2009, defendant's motion to amend its answer was allowed.

On 12 January 2009, defendant filed a motion for summary judgment. On 4 February 2009, defendant filed an amended motion for

LATO HOLDINGS, LLC v. BANK OF N.C.

[203 N.C. App. 332 (2010)]

summary judgment, arguing defenses (1), (4), and (8) of its answer. On 13 February 2009, plaintiff voluntarily dismissed its claim for unfair and deceptive trade practices. On 4 March 2009, the trial court granted defendant's motion for summary judgment and dismissed plaintiff's complaint with prejudice because

- (a) Plaintiff has failed to show the essential elements of a contract between the parties, including definiteness and agreement by the parties to the essential terms of the alleged contract, and
- (b) Plaintiff has failed to show that Defendant, which did not own the subject property at the time when Plaintiff says it performed work on the property, received any benefit from Plaintiff and Plaintiff also has failed to show the reasonable value of any alleged benefit to Defendant[.]

The trial court went on to note that it was not granting summary judgment as to defense (8), but only as to (1) and (4). Therefore, the trial court granted summary judgment because it found (1) there was no contract between plaintiff and defendant and that (4) defendant did not receive a benefit and plaintiff failed to show the value of the alleged benefit. Plaintiff and defendant appeal.

II. Defendant's Appeal

Defendant argues that because plaintiff was not a licensed general contractor pursuant to N.C. Gen. Stat. § 87-1, plaintiff cannot recover any damages for the work performed. We agree.

N.C. Gen. Stat. § 87-1 provides in pertinent part:

For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee, or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm, or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or more, or undertakes to erect a North Carolina labeled manufactured modular building meeting the North Carolina State Building Code, shall be deemed to be a 'general contractor' engaged in the business of general contracting in the State of North Carolina.

N.C. Gen. Stat. § 87-1 (2007). "[A]n unlicensed contractor may not recover on a contract or in *quantum meruit*." *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 785, 336 S.E.2d 108, 110

LATO HOLDINGS, LLC v. BANK OF N.C.

[203 N.C. App. 332 (2010)]

(1985) (citations omitted), *disc. review denied*, 316 N.C. 379, 342 S.E.2d 897 (1986).

Plaintiff contends “that factual issues existed as to whether Plaintiff’s undertaking came with[in] the provisions of N.C. Gen. Stat. § 87-1.” Plaintiff argues that the work it performed did not fall under N.C. Gen. Stat. § 87-1. Specifically as to “grading” as used in N.C. Gen. Stat. § 87-1, plaintiff claims

[t]he work performed by Plaintiff in the case at bar is not ‘grading’ because it was not performed as part of building and construction, but was performed to stabilize a temporary and poorly placed pile of dirt, to limit and reduce erosion problems caused by the pile of dirt and later to remove the pile of dirt from the property.

Plaintiff directs our attention to *Spivey and Self v. Highview Farms*, 110 N.C. App. 719, 431 S.E.2d 535, *disc. review denied*, 334 N.C. 623, 435 S.E.2d 342 (1993).

In *Spivey and Self*, the plaintiff and defendants had a contract for the plaintiff to construct a golf course on land owned by defendants. *See id.* at 722, 431 S.E.2d at 536. The plaintiff began work on the golf course but later left the job and filed a complaint against the defendants, alleging that the defendants had failed to pay in a timely manner under the contract and seeking \$226,000 in damages. *See id.* The defendants brought a counterclaim against the plaintiff, seeking damages in the amount of \$340,000 “alleging that [the] plaintiff’s failure to continue work had prevented it from completing the course prior to the 1991 growing season.” *Id.* at 723, 431 S.E.2d at 537. During trial, the defendants’ motion for directed verdict, which was partly based upon the defendants’ contention that the “plaintiff was not entitled to recover because it was not a licensed general contractor[,]” was denied by the trial court. *Id.* On appeal, the defendants argued “that they were entitled to a directed verdict on plaintiff’s claims on the ground that plaintiff did not have a license as required by N.C.G.S. § 87-1 and N.C.G.S. § 87-10, and was thus precluded from recovery.” *Id.* at 725, 431 S.E.2d at 538. This Court stated that

[i]n *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Management Corp.*, our Supreme Court held that if “grading” is an integral part of work properly termed “building and construction,” a license is required to perform the grading work. Assuming, therefore, without deciding, that construction of a golf course is “building and construction” as contemplated by *Walker*,

LATO HOLDINGS, LLC v. BANK OF N.C.

[203 N.C. App. 332 (2010)]

because the grading was an integral part of the golf course construction plaintiff was required to have a general contractor's license if the cost of the grading work was \$45,000.00 [now \$30,000.00] or more.

In this case, there is no evidence as to what portion of the \$1,100,000.00 contract was for the grading of the project, and to assign any value would require raw speculation. Because the record does not reflect that the grading had a cost of at least \$45,000.00, the trial court correctly determined that plaintiff did not violate N.C.G.S. § 87-1 and was not therefore precluded from suing defendants.

Id. at 726, 431 S.E.2d at 539 (citations, quotation marks, and ellipses omitted). "Grading," as used in N.C. Gen. Stat. § 87-1, "connotes an activity which is a part of, or *preparatory for, work properly termed 'building and construction.'*" *Walker Grading & Hauling v. S.R.F. Mgmt. Corp.*, 311 N.C. 170, 180, 316 S.E.2d 298, 304 (1984) (emphasis added). The definition of "grading" in this context is "to level off to a smooth horizontal or sloping surface[.]" Merriam-Webster's Collegiate Dictionary 542 (11th ed. 2005).

Plaintiff contends that the work it performed was not "grading" within the meaning of N.C. Gen. Stat. § 87-1 because it was done only to stabilize the site, prevent erosion, and remove the dirt. Plaintiff's manager, Frank R. Lato, filed an affidavit denying that plaintiff's work should be considered "grading" because the land was not being graded to a particular elevation as dictated by construction plans. However, plaintiff's verified complaint alleged that "Defendant contracted with Plaintiff in July 2007 to provide and furnish various labor and services to . . . *prepare the Property as a site for residential construction.*" (Emphasis added.) Although Mr. Lato denied that plaintiff performed "grading," he also claimed that "[t]he mound of dirt had to be removed *before buildings could be constructed* where the mound was located" and that "[t]he mound of dirt first had to be stabilized and then the dirt removed for the Property to be developed." (Emphasis added.) Also, Mr. Lato's affidavit describes removal of dirt *to prepare* land for building construction. As noted above, "grading," as used in N.C. Gen. Stat. § 87-1, "connotes an activity which is a part of, or *preparatory for, work properly termed 'building and construction.'*" *Walker Grading & Hauling* at 180, 316 S.E.2d at 304 (emphasis added). Mr. Lato's affidavit clearly describes work which can only be denominated as "grading," which was done to prepare the land for construction of buildings. *See id.* at 180, 316 S.E.2d at 304.

LATO HOLDINGS, LLC v. BANK OF N.C.

[203 N.C. App. 332 (2010)]

Grading was clearly an integral part of the work performed as plaintiff asserts on at least three occasions that the purpose of stabilizing and removing the dirt mound was in order *to prepare* the site for construction. *See Spivey and Self* at 726, 431 S.E.2d at 539.

Plaintiff also argues that even if we conclude that the work it performed was “grading” pursuant to N.C. Gen. Stat. § 87-1 *and* we conclude that “grading” was an integral part of its work, “Defendant has offered no evidence to suggest that the cost of any grading performed by Plaintiff was \$30,000 or more.” However, Mr. Lato’s affidavit also establishes that over \$30,000.00 plaintiff claimed as damages for the project was for grading work. Mr. Lato avers that plaintiff spent \$43,132.00 to rent an excavator. The affidavit states that “[i]n order for plaintiff to stabilize the mound and remove the dirt, plaintiff had to lease an excavator.” The purpose of stabilizing and removing was because “[t]he mound of dirt first had to be stabilized and then the dirt removed for the Property to be developed.” Thus, Mr. Lato admitted that at least \$43,132.00 was attributable to grading work which was preparatory for construction, as this was the cost of rental of an excavator. Therefore, plaintiff’s complaint and affidavits indicate that plaintiff performed “grading” pursuant to N.C. Gen. Stat. § 87-1; grading was an integral part of plaintiff’s work; and the grading cost more than \$30,000.00. Thus, plaintiff has performed the work of a general contractor for which it must be licensed in order to recover damages for breach of contract or in quantum meruit. *See* N.C. Gen. Stat. § 87-1; *Reliable Properties* at 785, 336 S.E.2d at 110. Plaintiff has admitted through Mr. Lato’s deposition that it did not have a general contractor’s license at the time it performed its work, so plaintiff cannot recover in quantum meruit. *See* N.C. Gen. Stat. § 87-1; *Reliable Properties* at 785, 336 S.E.2d at 110.

III. Plaintiff’s Appeal

Plaintiff’s issues on appeal are based upon the trial court’s order which concluded that it could not recover in quantum meruit.¹ However, we need not address plaintiff’s issues as we have already concluded that because plaintiff performed the work of a general contractor without a license, it may not recover in quantum meruit. Thus, even if we were to agree with plaintiff that the trial court erred in concluding that (1) defendant did not receive a benefit and (2) plaintiff failed to offer evidence of the reasonable value of its work, plaintiff still could not recover for the reasons stated above,

1. Plaintiff abandoned its arguments regarding breach of contract on appeal.

KELLY v. REGENCY CTRS. CORP.

[203 N.C. App. 339 (2010)]

and thus we affirm the trial court order. *See State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (“A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable.” (citation omitted)), *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). Thus, plaintiff’s arguments are without merit.

IV. Conclusion

As we have concluded that plaintiff performed the work of a general contractor without a license, and plaintiff cannot recover in quantum meruit, we affirm the decision of the trial court.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

JOHN WALTER KELLY, ADMINISTRATOR OF THE ESTATE OF ETHEL FAYE INGRAM, PLAINTIFF v. REGENCY CENTERS CORPORATION, BY AND THROUGH ITS REGISTERED AGENT CORPORATION SERVICE COMPANY, DEFENDANT

No. COA09-715

(Filed 6 April 2010)

Premises Liability— contributory negligence—known danger

The trial court did not err in a slip and fall case by granting summary judgment in favor of defendant corporation based on its defense of contributory negligence. Both the sidewalk curb where the victim parked or the lack of a properly handicapped sanctioned route, even if either was an obvious defect or danger, were easily discoverable or likely to be known by the victim.

Appeal by plaintiff from judgment entered 15 January 2009 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 4 November 2009.

Christopher & Page, PA, by Glenn R. Page and Charles H. Christopher, for plaintiff-appellant.

Cranfill, Sumner, and Hartzog, LLP, by Katie Hartzog and Dan M. Hartzog, for defendant-appellee.

KELLY v. REGENCY CTRS. CORP.

[203 N.C. App. 339 (2010)]

HUNTER, Jr., ROBERT N., Judge.

John Walter Kelly, as Administrator of the Estate of Ethel Faye Ingram (“plaintiff”), appeals an order granting summary judgment to Regency Centers Corporation (“defendant”) based on its defense of contributory negligence arising from Ethel Faye Ingram’s (“Ms. Ingram”) trip and fall in the parking lot of Cameron Village in Raleigh, North Carolina. After review of the record, we affirm.

I. FACTS

At the time of her injury on 26 March 2006, Ms. Ingram was 52 years old and since 1993 had lived with John Walter Kelly, her companion and the administrator of her estate. On that date, Ms. Ingram made a luncheon appointment with her stepmother, Agnes Watkins, and an acquaintance to dine at the K&W Cafeteria at Cameron Village. At the time of her injuries, Ms. Ingram qualified for handicapped parking status; however, when plaintiff arrived at Cameron Village, she parked in one of the non-handicapped parking spaces closest to the K&W Cafeteria entrance. After exiting the car, plaintiff alleges that Ms. Ingram fell somewhere between the car and the cafeteria while stepping over the curb to walk on the sidewalk. Ms. Ingram landed on her left side, fracturing her left hip and lacerating her left elbow.

Wake County EMS was called to the scene and their medical records indicate that “[Ms. Ingram] [s]tates she was stepping up to the curb and fell to the ground landing on her L hip and L arm.” Ms. Ingram was taken to the Rex Healthcare Emergency Room, where Dr. Kenton R. Cook recorded the following entry:

[S]he has had chronic lower extremity weakness for the past month and a half to two months, presumably from neuropathy but she has not really been told why. She was walking to meet her stepmother at the K&W cafeteria today when she went to step up on a curb, lost her balance and fell, landing on her left hip.

Two other nurses at Rex Healthcare made similar entries in their medical records that Ms. Ingram “could not lift her leg” and “lost her balance.” Plaintiff testified that he had no other evidence to support his contention that Ms. Ingram tripped on the curb.

Prior to the accident, Ms. Ingram qualified for handicapped parking status based in part on medical problems she suffered, two of which are relevant to this case: end-stage renal disease and diabetic

KELLY v. REGENCY CTRS. CORP.

[203 N.C. App. 339 (2010)]

neuropathy which cause complete, permanent numbness in her feet. Prior to the accident, Ms. Ingram had ambulatory therapy using a walker and was assisted by her companion around the house. According to an affidavit of Debra Poole, a close friend of Ms. Ingram, Ms. Ingram was able to walk unassisted despite her medical challenges on 11 March 2006, two weeks before the accident. At the precise time of her injury, she was able to walk unassisted.

Ms. Ingram died on 11 December 2006 from cardiac arrhythmia secondary to GI hemorrhage with acute bronchopneumonia. Her direct testimony was not preserved by deposition or otherwise. After her death, Ms. Ingram's administrator filed a complaint for damages alleging: (1) Regency failed in its duty to properly operate and maintain the sidewalk outside the K&W Cafeteria; (2) failure to eliminate hazards posed by a raised sidewalk; (3) failure to inspect the premises properly and effectively; and (4) failure to keep the sidewalk in compliance with the North Carolina Accessibility Code of the N.C. State Building Code ("ACA") and the Americans with Disabilities Act ("ADA"). In its answer, Regency alleged contributory negligence, along with other defenses, as a bar to any recovery. Both parties filed cross motions for partial summary judgment on the issue of contributory negligence. The trial court granted Regency's motion for summary judgment and dismissed the complaint. Plaintiff appeals from the trial court's order.

II. JURISDICTION and STANDARD OF REVIEW

This Court has jurisdiction to hear appeals from final judgments pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). The standard of review of an order granting summary judgment is *de novo*. *Nationwide Mut. Fire Ins. Co. v. Mnatsakanov*, 191 N.C. App. 802, 804, 664 S.E.2d 13, 15 (2008). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c). "It is not the purpose of the rule to resolve disputed material issues of fact but rather to determine if such issues exist." N.C. R. Civ. P. 56 cmt. (2000). The burden of showing a lack of triable issues of fact falls upon the moving party. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent, (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim, or (3) that an affirmative

KELLY v. REGENCY CTRS. CORP.

[203 N.C. App. 339 (2010)]

defense would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once this burden has been met, the non-moving party must produce a forecast of evidence demonstrating that it will be able to make out at least a *prima facie* case at trial. *Id.* In determining whether that burden has been met, the court “must view all the evidence in the light most favorable to the non-movant, accepting all its asserted facts as true, and drawing all reasonable inferences in its favor.” *Lilley v. Blue Ridge Electric Membership Corp.*, 133 N.C. App. 256, 258, 515 S.E.2d 483, 485 (1999). The Court must exercise caution in granting a motion for summary judgment. *Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976).

III. ANALYSIS

In his brief, plaintiff contends the following: (1) that Regency was *per se* negligent when it failed, according to the requirements of the ACA and the ADA, to create an accessible route from the parking lot to the entrance of the K&W Cafeteria for handicapped persons to use; (2) that Ms. Ingram parked in a space, both closest to the restaurant and 200 feet from the entrance thereto of the restaurant; (3) that the law required defendant to create an accessible route; and (4) defendant had agreed to create an accessible route in 2004, but did not fulfill its agreement until after Ms. Ingram’s injury.

Moreover, plaintiff maintains that Ms. Ingram, at the time of her fall, was not required to use any type of assistive device to ambulate, and thus was reasonable in physically attempting to enter the facility. Without examining whether Ms. Ingram required assistance in detail, we assume for purposes of our analysis that her contention is an accurate forecast of the evidence that plaintiff would present at trial.

We begin our analysis by noting that summary judgment is “rarely appropriate” in the context of negligence; “the trial court will grant summary judgment . . . where the evidence is uncontroverted that a party failed to use ordinary care and that want of ordinary care was at least one of the proximate causes of the injury.” *Diorio v. Penny*, 103 N.C. App. 407, 408, 405 S.E.2d 789, 790 (1991), *aff’d*, 331 N.C. 726, 417 S.E.2d 457 (1992). “In a case dealing with a plaintiff’s injury from slipping and falling [t]he basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety.” *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 395, 651 S.E.2d 261, 265 (2007) (citation omitted).

KELLY v. REGENCY CTRS. CORP.

[203 N.C. App. 339 (2010)]

North Carolina landowners, such as Regency Centers Corporation, are required to exercise reasonable care to provide for the safety of all lawful visitors on their property. *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646 (1999). Whether a landowner's care is reasonable is judged against the conduct of a reasonably prudent person under the circumstances. *Id.* There is no duty to protect a lawful visitor from dangers which are either known to him or so obvious and apparent that they may reasonably be expected to be discovered. *Id.* at 162, 516 S.E.2d at 646.

Moreover, "[w]hen a plaintiff does not discover and avoid an obvious defect, that plaintiff will usually be considered to have been contributorily negligent as a matter of law." *Price v. Jack Eckerd Corporation.*, 100 N.C. App. 732, 736, 398 S.E.2d 49, 52 (1990). "However, 'where there is "some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition," the general rule does not apply." *Id.* (citations omitted).

Applying the foregoing principles to the facts, we conclude that either the sidewalk curb where Ms. Ingram parked, or the lack of a properly handicapped sanctioned route, even if either was an obvious defect or danger, was easily discoverable or likely to be known by Ms. Ingram. Evidence forecast that Ms. Ingram had been a frequent patron of the K&W Cafeteria prior to the accident. It is well settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger. *Dunnevant v. R.R.*, 167 N.C. 232, 232, 83 S.E. 347, 348 (1914); *Gordon v. Sprott*, 231 N.C. 472, 476, 57 S.E.2d 785, 785 (1950); *Cook v. Winston-Salem*, 241 N.C. 422, 430, 85 S.E.2d 696, 701-02 (1955). In other words, "[w]hen an invitee sees an obstacle not hidden or concealed and proceeds with full knowledge and awareness, there can be no recovery." *Wyrick v. K-Mart Apparel Fashions*, 93 N.C. App. 508, 509, 378 S.E.2d 435, 436 (1989).

Furthermore, sidewalks, and the height of a curb, have been held to be so obviously a discoverable condition that the failure of a plaintiff to notice the condition and take appropriate action to avoid injury has been found by our appellate courts to be contributory negligence as a matter of law. *See, e.g., Jacobs v. Hill's Food Stores, Inc.*, 88 N.C. App. 730, 364 S.E.2d 692 (1988). In *Jacobs*, the Court affirmed the trial court's grant of summary judgment in favor of the defendant where the plaintiff tripped and fell over the curb, after failing to notice the

KELLY v. REGENCY CTRS. CORP.

[203 N.C. App. 339 (2010)]

ten-foot long, one-foot high concrete curb while walking in defendant Food Store Inc.'s parking lot. *Id.* at 731, 364 S.E.2d at 693. In that case, plaintiff testified that she never saw or noticed the curb. *Id.* The Court in *Jacobs* held that the defendant had no special duty to warn plaintiff of the curb because it was an open and obvious condition clearly observable. *Id.* at 733, 364 S.E.2d at 694.

A landowner need not warn of any "apparent hazards or circumstances of which the invitee has equal or superior knowledge." *Jenkins v. Lake Montonia Club*, 125 N.C. App. 102, 105, 479 S.E.2d 259, 262 (1997). Rather, "[a] reasonable person should be observant to avoid injury from a known and obvious danger." *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 546, 459 S.E.2d 23, 27 (1995).

In the present case, plaintiff presented no evidence that the curb or route to the entrance was obstructed or hidden in any way, or that her attention was diverted by a condition on the premises. As a result, we conclude that there is no evidence forecast under which plaintiff could overcome the defense of contributory negligence.

IV. CONCLUSION

The evidence is uncontroverted that the curb, sidewalk, and route to the entrance were all open and obvious conditions likely to be known to plaintiff. Plaintiff's failure to notice these conditions was a proximate cause of her injuries. Accordingly, we affirm the trial court's grant of partial summary judgment in favor of defendant based on plaintiff's contributory negligence.

Affirmed.

Judges ELMORE and STEELMAN concur.

CLONINGER v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 345 (2010)]

ELLA MAE CLONINGER, DECEASED (MEDICAID RECIPIENT) REPRESENTED BY ALFRED E. CLONINGER, SR., EXECUTOR OF THE ESTATE OF ELLA MAE CLONINGER, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA09-970

(Filed 6 April 2010)

1. Public Assistance— Medicaid—resource limits—unknown insurance policies

The trial court did not err by concluding that the available resources of an Alzheimer's patient were in excess of the allowable Medicaid reserve limit when she began receiving benefits where it was discovered that she had two insurance policies which her children, who held her power of attorney, had not known about when benefits began. Neither the North Carolina Administrative Code nor the Medicaid Manual require that financial resources be known, only that they be available.

2. Constitutional Law— revocation of Medicaid benefits—no Due Process or Equal Protection violation

A Medicaid recipient was not denied Due Process by a delay in the hearing officer's final decision on revocation of benefits where petitioners did not take advantage of their statutory right to compel the hearing officer to take action. Furthermore, there was no Equal Protection violation because the application of the statutes did not arbitrarily classify the decedent.

Appeal by Petitioners from order entered 10 February 2009 by Judge David S. Cayer in Gaston County Superior Court. Heard in the Court of Appeals 27 January 2010.

Daniel L. Taylor, for Petitioner-Appellants.

Attorney General Roy Cooper, by Assistant Attorney General Jennifer L. Hillman, for Respondent-Appellee.

BEASLEY, Judge.

Petitioners appeal from a trial court order, finding that Ella Mae Cloninger was ineligible for Medicaid benefits and that they were required to repay all funds received during the period of ineligibility. Because Ella Mae Cloninger was ineligible for the Medicaid benefits she received, we affirm.

CLONINGER v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 345 (2010)]

In May 2000, Alfred E. Cloninger, Sr., and Carolyn Costner filed for Medicaid benefits on behalf of their mother, Ella Mae Cloninger. On 28 May 2000, Ella Mae Cloninger, suffering from the effects of Alzheimer's disease, entered a long-term care facility in North Carolina. Prior to Ella Mae Cloninger's admission into the facility, her children were appointed as her power of attorney.

On 2 June 2005, Petitioners' attorney informed the Gaston County Department of Social Services of the insurance policies and their respective cash values. Ella Mae Cloninger's children, acting with the power of attorney, were notified "that [Ella Mae Cloninger] had two endowment insurance policies that totaled \$330,685.18." "The family [contended] that they were not aware of the two policies until they were notified as a result of a Class Action Law suit against Lutheran Brotherhood Insurance Company and were notified by the courts." After receiving notice of the insurance policies, Petitioners cashed them in and placed the funds in an account under Ella Mae Cloninger's name.

On 6 June 2005, the Gaston County Department of Social Services notified Petitioners of their intent to terminate Medicaid benefits for Ella Mae Cloninger because her assets were over the allowable reserve limit of \$2,000. On 29 June 2005, the Gaston County Department of Social Services informed Petitioners that the Medicaid funds spent on Ella Mae Cloninger would be treated as an overpayment, in the amount of \$142,366.44. Petitioners' attorney requested a hearing in light of the Department of Social Services' conclusion. After a series of appeals, a final decision was issued on 24 January 2008. The Chief Hearing Officer of the Department of Health and Human Services found that "[Petitioners'] reserve of \$330,685.18 is in excess of the allowable reserve limit of \$2,000 rendering the [Petitioner] ineligible for Medicaid benefits. Furthermore, I find [Petitioner] liable for the repayment of all Medicaid benefits paid on [their] behalf." In an order issued 10 February 2009, the trial court affirmed the final decision of the Department of Health and Human Services.

Petitioners appeal the trial court's order generally arguing that: (I) the trial court erroneously determined that Ella Mae Cloninger's available resources made her ineligible for Medicaid; and (II) the trial court erroneously failed to determine that Ella Mae Cloninger's due process and equal protection rights were violated.

CLONINGER v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 345 (2010)]

I.

[1] Petitioners first contend that the trial court erroneously concluded that Ella Mae Cloninger's available resources were in excess of the allowable reserve limit when she began receiving Medicaid benefits. We disagree.

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2-3 (2006) (citing *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted). "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 530, 372 S.E.2d at 889-90 (internal quotations and citations omitted). Considering all evidence in the record, the reviewing court must determine whether there was a rational basis for the administrative decision. *Id.*

"Medicaid is a federal program that provides health care funding for needy persons through cost-sharing with states electing to participate in the program." *Luna v. Division of Soc. Servs.*, 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004) (internal quotations and citation omitted). The North Carolina General Assembly has authorized the creation of a Medicaid program in North Carolina. *See* N.C. Gen. Stat. § 108A-54 (2009). The Medicaid program is administered by the Department of Social Services under rules promulgated by the Department of Health and Human Services. N.C. Gen. Stat. § 108A-25(b) (2009). "Participation in the program is optional; however, once the State opts to participate, it must develop a plan which complies with federal law." *Thorne v. N.C. Dept. of Human Resources*, 82 N.C. App. 548, 550, 347 S.E.2d 88, 90 (1986) (citation omitted).

"Each state establishes its own criteria for assessing Medicaid eligibility; therefore, '[a]n individual is entitled to Medicaid if he fulfills

CLONINGER v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 345 (2010)]

the criteria established by the [s]tate in which he lives.' ” *Estate of Wilson v. Div. of Social Services*, — N.C. App. —, —, 685 S.E.2d 135, 138 (2009) (quoting *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37, 69 L. Ed. 2d 460, 465 (1981)). The North Carolina Adult Medical Manual was developed by the Department of Health and Human Services to act as a practical guide to interpreting an applicant's potential Medicaid eligibility. *Id.*

In its policy section, the Adult Medicaid Manual explains that a potential recipient is ineligible for medicaid benefits “if countable resources exceed the resource limit or the ‘reserve’ limit.” North Carolina Adult Medicaid Manual § 2230I (2008).

The value of resources currently available to any budget unit member shall be considered in determining financial eligibility. A resource shall be considered available when it is actually available and when the budget unit member has a legal interest in the resource and he, or someone acting in his behalf, can take any necessary action to make it available.

N.C. Admin. Code tit. 10A, r. 21B.0310(b) (June 2008). An applicant's resources may be excluded from eligibility consideration if the Medicaid recipient is incompetent; however, resources will not be excluded from consideration if a durable power of attorney has been awarded to an individual authorized to exercise that power. N.C. Admin. Code tit. 10A, r. 21B.0310(c).

Here, in light of Ella Mae Cloninger's available assets at the time she began receiving Medicaid, the trial court appropriately determined that she was ineligible for Medicaid benefits. On 28 May 2000, Ella Mae Cloninger entered a long-term care facility and became eligible for Medicaid benefits. The applicable reserve limit for Ella Mae Cloninger was \$2,000. The parties also agree that at the time she entered into the facility, Ella Mae Cloninger had two insurance policies valued at \$330,685.18. Because the value of Ella Mae Cloninger's life insurance policy exceeded \$10,000, they could be considered as a resource for Medicaid eligibility. *See* N.C. Admin. Code tit. 10A, r. 21B.0310(1)(6) (explaining that the cash value of a life insurance policy will not be counted “when the total face value of all cash value bearing life insurance policies does not exceed ten thousand dollars.”) The value of Ella Mae Cloninger's life insurance policies exceeded the \$2,000 reserve limit for Medicaid eligibility. Therefore, when Ella Mae Cloninger entered the care facility, she was ineligible for Medicaid benefits.

CLONINGER v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 345 (2010)]

Petitioners argue that because they were unaware of the existence of the life insurance policies and the value of the policies, they were not “available” and should not be considered for Medicaid eligibility. However, the North Carolina Administrative Code requires only that the resources are “available” and someone acting on behalf of the recipient “can take any necessary action” to make the resources available. *See* N.C. Admin. Code tit. 10A, r. 21B.0310(b). Neither the Administrative Code nor the Medicaid Manual requires that the financial resources be “known.” The cash value of Ella Mae Cloninger’s life insurance policy was available before she began receiving any Medicaid benefits. In addition, no legal impediment prohibited Ella Mae Cloninger’s children, acting with the power of attorney, from obtaining the funds. Moreover, the record indicates that Ella Mae Cloninger’s children may have been aware of the policies but failed to determine their cash value. Ella Mae Cloninger was ineligible when she began receiving Medicaid benefits in 2000. Because Ella Mae Cloninger already received Medicaid benefits while she was ineligible, provisions of the Medicaid Manual that allow Medicaid recipients an opportunity to reduce excess funds in order to fall within the allowable limits of Medicaid eligibility were unavailable. Because Petitioners received an overpayment of Medicaid benefits in the amount of \$142,366.44, the trial court correctly determined that they were liable for the overpaid amount. *See* N.C. Admin. Code tit. 10A, r. 22F.0706 (June 2008).

Accordingly, we hold that the trial court correctly determined that Ella Mae Cloninger was ineligible for Medicaid benefits and that Petitioners are liable for the overpaid amount.

II.

[2] Petitioners next contend that the trial court erroneously failed to determine that the Department of Health and Human Services violated Ella Mae Cloninger’s Due Process and Equal Protection rights. We disagree.

In a Medicaid context, Due Process requires “that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.” *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 25 L. Ed. 2d 287, 299 (1970); *see also* 42 C.F.R. § 431.205(d) (2009) (stating that a Medicaid hearing system must be in compliance with the standards set forth in *Goldberg*).

STATE v. DANIELS

[203 N.C. App. 350 (2010)]

Following an administrative hearing, the hearing officer has 90 days from the date of the requested hearing to render his final decision. *See* N.C. Gen. Stat. § 108A-79(j) (2009). “Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge.” N.C. Gen. Stat. § 150B-44 (2009).

Here, the administrative hearing officer received Petitioners’ argument in September 2006, but the hearing officer’s final decision was not rendered until January 2008. While the hearing officer’s final decision did come for some time after the hearing date, Petitioners failed to take advantage of their statutory right to compel the hearing officer to take action. Petitioners were afforded an adequate opportunity to have their concerns addressed in a timely manner, but merely failed to take advantage of this right. Moreover, Petitioners’ equal protection rights were not violated by the hearing officer’s delay. Generally, “[t]he equal protection clause of the Fourteenth Amendment prevents a state from making arbitrary classifications which result in invidious discrimination.” *State v. Tatum*, 291 N.C. 73, 83, 229 S.E.2d 562, 568 (1976). “Without some type of ‘classification’ of an individual, there is no equal protection claim.” *Phelps v. Phelps*, 337 N.C. 344, 350, 446 S.E.2d 17, 20 (1994) (citation omitted). In this case, the application of the statutes do not arbitrarily “classify” Ella Mae Cloninger, resulting in discrimination. Accordingly, we affirm.

Affirm.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. RONNIE LAMAR DANIELS, DEFENDANT

No. COA09-728

(Filed 6 April 2010)

1. Sentencing—resentencing—more severe term

The trial court erred when resentencing defendant for first-degree rape by imposing a sentence that exceeded the original term. Although the State argues that the court should consider

STATE v. DANIELS

[203 N.C. App. 350 (2010)]

defendant's sentences in the aggregate, the plain language of N.C.G.S. § 15A-1335 states that the trial court may not impose a more severe sentence for the same offense. There is no indication that the statute was altered by the passage of the Structured Sentencing Act.

2. Sentencing—resentencing—appeal of right—minimum sentence determinative

Defendant had no appeal as a matter of right from a sentence for second-degree kidnapping that was at the top of the presumptive range after the court found one mitigating factor and no aggravating factors. It is defendant's minimum sentence that determines whether N.C.G.S. § 15A-1444(a) is applicable; here, defendant's minimum sentence was within the presumptive range even though the maximum term entered the aggravated range. Defendant did not petition for *certiorari*.

Appeal by defendant from judgments entered 11 December 2008 by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals on 29 October 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen N. Bolton, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

STROUD, Judge.

Ronnie Lamar Daniels ("defendant") appeals from the trial court's judgments sentencing him for convictions for first-degree rape and second-degree kidnapping. Because the trial court's resentencing of defendant for his first-degree rape conviction exceeded his original sentence, we vacate defendant's sentence as to his first-degree rape conviction and remand for a new sentencing hearing. Additionally, because defendant was sentenced within the presumptive range for his conviction of second-degree kidnapping, we dismiss his appeal as to that issue.

I. Background

On 20 March 2007, a jury found defendant guilty of first-degree rape and first-degree kidnapping. Defendant was sentenced to consecutive terms of imprisonment of 307 to 378 months for the first-degree rape conviction and 133 to 169 months for the first-degree kidnapping conviction.

STATE v. DANIELS

[203 N.C. App. 350 (2010)]

On appeal, this Court held that it was error for the trial court to permit the same sexual assault to serve as the basis for defendant's convictions of first-degree rape and first-degree kidnapping. *State v. Daniels*, 189 N.C. App. 705, 709-10, 659 S.E.2d 22, 25 (2008). This Court remanded for a new sentencing hearing on the charges of first-degree rape and first-degree kidnapping with the following instructions:

At the resentencing hearing, the trial court may 1) arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or 2) arrest judgment on the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction.

Id. at 710, 659 S.E.2d at 25.

This case came on for a resentencing hearing during the 8 December 2008 Criminal Administrative Session of Superior Court, Hoke County. After hearings on 9 and 11 December 2008, the trial court found as a mitigating factor, pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(14), that defendant had been honorably discharged from the United States armed services, but found no aggravating factors. The trial court then sentenced defendant to a term of 370 to 453 months imprisonment for the first-degree rape conviction, arrested judgment on the first-degree kidnapping conviction, and imposed a consecutive term of 46 to 65 months imprisonment for second-degree kidnapping. Defendant gave notice of appeal in open court.

II. Defendant's Resentencing for his First-Degree Rape Conviction

[1] Defendant first contends that the trial court erred by resentencing him to a more severe sentence on remand for his conviction of first-degree rape in violation of N.C. Gen. Stat. § 15A-1335.

When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 (2008). Here, defendant was originally sentenced to 307 to 378 months imprisonment for his first-degree rape conviction. On remand, the trial court resentedenced defendant to 370 to 453 months imprisonment for the same conviction. The trial court

STATE v. DANIELS

[203 N.C. App. 350 (2010)]

credited defendant for 633 days spent in confinement, but defendant's sentence still amounts to a term of 348 months to 427 months imprisonment, greater than his original sentence. Therefore, defendant's sentence violates N.C. Gen. Stat. § 15A-1335 because it exceeds his original sentence for his first-degree rape conviction.

The State, citing *State v. Moffitt*, 185 N.C. App. 308, 648 S.E.2d 272, *disc. review denied*, 361 N.C. 700, 654 S.E.2d 707 (2007), argues that in determining whether a resentencing is more severe, the duration of the sentences should not be considered individually for each conviction but the Court should consider whether defendant's sentences in the aggregate are greater than his original sentences in the aggregate. However, as *Moffitt's* holding addressed the application of N.C. Gen. Stat. § 15A-1335 as to the trial court's consolidation of the defendant's multiple convictions at his resentencing hearing, and defendant's convictions here were not consolidated, we find *Moffitt* inapplicable. *See id.* at 312, 648 S.E.2d at 274 (holding that while N.C. Gen. Stat. § 15A-1335 "prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand").

In contrast to the State's contentions, the plain language of N.C. Gen. Stat. § 15A-1335 states that the trial court "may not impose a new sentence for *the same offense* . . . which is more severe" than the original sentence. (emphasis added). Further, this Court has held that "the prohibition against imposing more severe sentences after appeal [pursuant to] N.C. Gen. Stat. § 15A-1335 . . . applies to offenses charged and convictions thereon, not to an aggregate term of years." *State v. Nixon*, 119 N.C. App. 571, 573, 459 S.E.2d 49, 50 (1995) (citing *State v. Hemby*, 333 N.C. 331, 337, 426 S.E.2d 77, 80 (1993)).

The State argues that the rulings in *Nixon* and *Hemby* are not applicable because they were decided under the Fair Sentencing Act and defendant was sentenced under the Structured Sentencing Act. The Fair Sentencing Act was repealed in 1993 by the Structured Sentencing Act, which applies to criminal offenses in North Carolina that occur on or after 1 October 1994. *See generally State v. Ruff*, 349 N.C. 213, 216, 505 S.E.2d 579, 580 (1998). However, our Appellate Courts have not only applied the rule that N.C. Gen. Stat. § 15A-1335 "applies to offenses charged and convictions thereon and not to an aggregate term of years" in cases decided under the Fair Sentencing Act, such as *Hemby* and *Nixon*, but they have also applied this rule to cases in which the defendant was sentenced for crimes under the

STATE v. DANIELS

[203 N.C. App. 350 (2010)]

Structured Sentencing Act. *See State v. Oliver*, 155 N.C. App. 209, 211, 573 S.E.2d 257, 258 (2002) (holding that “[w]hen multiple sentences are involved, N.C.G.S. § 15A-1335 bars the trial court from imposing an increased sentence for any of the convictions, even if the total term of imprisonment does not exceed that of the original sentence”), *appeal dismissed and disc. review denied*, 357 N.C. 254, 583 S.E.2d 45 (2003). Further, there is no indication by our Legislature in N.C. Gen. Stat. § 15A-1335 or statutes enacted under the Structured Sentencing Act that N.C. Gen. Stat. § 15A-1335 was altered when our Legislature enacted the Structured Sentencing Act. Therefore, we are not persuaded by the State’s argument.

Accordingly, we vacate defendant’s sentence as to his conviction for first-degree rape and remand for a new sentencing hearing, with the instruction that defendant’s resentencing for this conviction may not exceed his original sentence of 307 to 378 months of imprisonment, “less the portion of the prior sentence previously served.” N.C. Gen. Stat. § 15A-1335.

III. Defendant’s Sentencing for Second-Degree Kidnapping

[2] Defendant next contends that the trial court abused its discretion by sentencing him at the top of the presumptive range for his conviction for second-degree kidnapping, after having found one mitigating factor and no aggravating factors.

A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing *only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant’s prior record or conviction level and class of offense*. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2008) (emphasis added).

On remand, the trial court arrested judgment on defendant’s first-degree kidnapping verdict and imposed a sentence of 46 to 65 months for second-degree kidnapping. N.C. Gen. Stat. § 14-39(b) (2008) states that second-degree kidnapping is a class E felony. Pursuant to N.C. Gen. Stat. § 15A-1340.14 (2008), defendant was determined to have a prior record level of IV, based on his prior record points. N.C. Gen. Stat. § 15A-1340.17(c) (2008) states that the presumptive range of

STATE v. DANIELS

[203 N.C. App. 350 (2010)]

punishment for a defendant convicted of a class E felony and with a prior record level of IV is a minimum of 37 months of imprisonment to a maximum of 46 months of imprisonment. It is defendant's "minimum sentence of imprisonment[.]" that determines whether N.C. Gen. Stat. § 15A-1444(a1) is applicable. Defendant's minimum sentence of 46 months imprisonment is still within the presumptive range, even though it is at the top of the presumptive range and his maximum term overlapped into the aggravated range. *See State v. Ramirez*, 156 N.C. App. 249, 259, 576 S.E.2d 714, 721, (holding that the defendant was properly sentenced in the presumptive range, even though the defendant's sentence was in an area where the presumptive range and the aggravated range overlapped), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 286 (2003). Because defendant's sentence for second-degree kidnapping was within the presumptive range, he had no direct appeal as a matter of right. N.C. Gen. Stat. § 15A-1444(a1); *see State v. McDonald*, 163 N.C. App. 458, 468, 593 S.E.2d 793, 799, (This Court citing N.C. Gen. Stat. § 15A-1444(a1) declined to address defendant's contentions as to his sentencing because defendant was sentenced in the presumptive range and therefore had "no direct appeal as a matter of right."), *cert. denied*, 358 N.C. 548, 599 S.E.2d 910 (2004); *State v. Brown*, 146 N.C. App. 590, 593, 553 S.E.2d 428, 430 (2001) (Because the defendant was sentenced within the presumptive range he was "not entitled as a matter of right to appeal his sentence."), *appeal dismissed and disc. review denied*, 356 N.C. 306, 570 S.E.2d 734 (2002).

Although N.C. Gen. Stat. § 15A-1444(a1) also provides that a defendant "may petition the appellate division for review of this issue by writ of certiorari[.]" defendant here made no petition to review his resentencing by writ of certiorari. Therefore, we decline to review defendant's appeal as to his sentencing for his conviction of second-degree kidnapping by writ of certiorari. *See State v. Knight*, 87 N.C. App. 125, 131, 360 S.E.2d 125, 129 (1987). (declining to review sentence by certiorari where no petition for writ of certiorari was filed).

Accordingly, we dismiss this portion of defendant's appeal.

IV. Conclusion

As the trial court erred in resentencing defendant for his conviction of first-degree rape to a more severe sentence than his original sentence, we vacate his sentence for first-degree rape and remand for a new sentencing hearing. As defendant's sentence for second-degree

DUNTON v. AYSCUE

[203 N.C. App. 356 (2010)]

kidnapping was within the presumptive range, we dismiss his appeal as to that issue.

VACATED, REMANDED IN PART AND DISMISSED IN PART.

Judges STEPHENS and BEASLEY concur.

CHARLES DUNTON, PLAINTIFF v. ANGELA MICHELLE AYSCUE, DEFENDANT

No. COA09-1242

(Filed 6 April 2010)

1. Civil Procedure— two dismissal rule—defendant not served in either prior suit

The trial court did not err by dismissing plaintiff's negligence complaint based on the "two dismissal" rule under N.C.G.S. § 1A-1, Rule 41(a)(1) despite defendant not being served in either of the two prior suits.

2. Appeal and Error— preservation of issues—failure to cite authority

Although plaintiff contends the trial court erred by dismissing his negligence complaint under N.C.G.S. § 1A-1, Rules 12(b)(1) and (12)(b)(6), his argument was abandoned based on his failure to cite authority as required by N.C. R. App. P. 28(b)(6). Further, plaintiff's arguments were simply a reprise of his contentions regarding the dismissal of the complaint under Rule 41(a)(1).

Appeal by plaintiff from order entered 18 May 2009 by Judge Shannon R. Joseph in Granville County Superior Court. Heard in the Court of Appeals 24 February 2010.

Willie S. Darbie for plaintiff-appellant.

Law Office of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff Charles Dunton appeals from the trial court's order dismissing his complaint pursuant to the "two dismissal" rule under Rule

DUNTON v. AYSCUE

[203 N.C. App. 356 (2010)]

41(a)(1), as well as Rule 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure. Plaintiff primarily argues that the trial court erred in dismissing his complaint because defendant Angela Michelle Ayscue was never served in the two prior actions and thus the “two dismissal” rule should not operate as a bar to his current cause of action against defendant. We conclude, based on prior precedent and the plain language of Rule 41(a)(1), that the trial court properly dismissed plaintiff’s current complaint.

Facts

Plaintiff filed a negligence action against defendant on 30 November 2007 (07 CVS 1281), alleging that on 31 March 2006 he suffered personal injuries as a result of a traffic accident caused by defendant. Plaintiff attempted to have defendant served by the sheriff’s department at an address in Henderson, North Carolina. The sheriff’s department, however, was unable to serve defendant as “[she] no longer live[d] at [the stated] address.” Plaintiff filed a notice of voluntary dismissal without prejudice of his action (07 CVS 1281) on 27 March 2008.

Plaintiff subsequently filed a second complaint (08 CVS 681) on 13 June 2008, alleging the same cause of action against defendant, and attempted to have defendant served at another address in Henderson. The sheriff’s department again was unable to serve defendant with process, noting that defendant had moved to an “unknown” address “somewhere between Warrenton and Littleton, NORTH CAROLINA.” Plaintiff filed a notice of voluntary dismissal without prejudice of his second complaint (08 CVS 681) on 23 March 2009.

Approximately three minutes after taking a voluntary dismissal on 23 March 2009, plaintiff filed a third complaint (09 CVS 318), asserting the same cause of action. Defendant was served with the summons and complaint (09 CVS 318) on 25 March 2009. Defendant filed an answer on 7 May 2009, generally denying plaintiff’s claim and moving to dismiss plaintiff’s complaint pursuant to Rule 12(b)(1), 12(b)(6), and Rule 41(a)(1). After conducting a hearing on defendant’s motion to dismiss, the trial court entered an order on 18 May 2009 concluding that under Rule 41(a)(1), “two dismissals of the identical claim act as an adjudication on the merits and bar a third action[.]” Consequently, the court dismissed plaintiff’s action (09 CVS 318). Plaintiff timely appealed to this Court.

DUNTON v. AYSCUE

[203 N.C. App. 356 (2010)]

I

[1] Plaintiff first argues that the trial court erred in dismissing his complaint pursuant to the “two dismissal” rule embodied in Rule 41, which provides in pertinent part: “[A] notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.” N.C. R. Civ. P. 41(a)(1). “[I]n enacting the two dismissal provision of Rule 41(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts.” *Richardson v. McCracken Enterprises*, 126 N.C. App. 506, 509, 485 S.E.2d 844, 846, *disc. review denied as to additional issues*, 347 N.C. 269, 493 S.E.2d 745 (1997), *aff’d per curiam*, 347 N.C. 660, 496 S.E.2d 380 (1998). The “two dismissal” rule has two elements: (1) the plaintiff must have filed two notices to dismiss under Rule 41(a)(1) and (2) the second action must have been based on or included the same claim as the first action. *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 165 (1989), *aff’d per curiam*, 326 N.C. 360, 388 S.E.2d 768 (1990).

Here, plaintiff does not dispute that he filed two notices of dismissal under Rule 41(a)(1) with respect to his personal injury claim against defendant and that the second action (08 CVS 681) was identical to the first action (07 CVS 1281). Pursuant to the “two dismissal” rule, plaintiff is precluded from bringing “a third action based upon the same set of facts.” *Richardson*, 126 N.C. App. at 509, 485 S.E.2d at 846. See *Graham v. Hardee’s Food Systems*, 121 N.C. App. 382, 384, 465 S.E.2d 558, 560 (1996) (“Since plaintiff twice dismissed her claims against Rogers, this served as an adjudication in his favor upon the merits.”). As our Supreme Court has held:

It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter. When a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.

Masters v. Dunstan, 256 N.C. 520, 523-24, 124 S.E.2d 574, 576 (1962) (alterations, internal citations, and quotation marks omitted).

DUNTON v. AYSCUE

[203 N.C. App. 356 (2010)]

Plaintiff nevertheless argues that “his actions should be declared an exception to the ‘two-dismissal rule’ of Rule 41(a)(1) since Defendant/Appellee was never before the court in the first or second action and Plaintiff/Appellant did not engage in activity that Rule 41(a)(1) was designed to protect defendants from.” The fact that defendant was never served in either the first or second action, however, is not dispositive as to the application of the “two dismissal” rule in this case. This Court has held that even when the trial court lacks personal jurisdiction over the defendant, Rule 41(a)(1) bars a third successive action involving the same claim:

[A] voluntary dismissal is effective whether or not a court has [personal] jurisdiction. A plaintiff is free to abandon an alleged or potential claim against another party at any time. Moreover, a Rule 41(a)(1) notice of dismissal is an action taken by the plaintiff ending the suit, and no action of the court is necessary to give the notice its full effect.

Carter v. Clowers, 102 N.C. App. 247, 250-51, 401 S.E.2d 662, 664 (1991) (internal citations omitted) (emphasis omitted).

“A plaintiff may take a voluntary dismissal *at any time* prior to resting his or her case.” *Brandenburg Land Co. v. Champion International Corp.*, 107 N.C. App. 102, 103, 418 S.E.2d 526, 527 (1992) (emphasis added). The “crucial element” is “the intention of the party actually to dismiss the case.” *Robinson v. General Mills Restaurants*, 110 N.C. App. 633, 636, 430 S.E.2d 696, 698 (1993), *disc. review improvidently allowed*, 335 N.C. 763, 440 S.E.2d 274 (1994). Plaintiff does not argue on appeal that he did not intend to dismiss his two prior complaints when he filed the two respective notices of voluntary dismissal. We conclude, therefore, that the trial court did not err in dismissing plaintiff’s third complaint based on the “two dismissal” rule despite defendant having not been served in either of the two prior suits. *See College Campus Apartments*, 94 N.C. App. at 284, 380 S.E.2d at 165-66 (holding that “two dismissal” rule operated as dismissal with prejudice of third complaint even though defendant in second and third suits was not same as defendant in first suit).

Plaintiff also argues that application of the “two dismissal” rule in this case would conflict with the legislative intent behind Rule 41(a)(1). The comment to Rule 41 indicates that the “two dismissal” rule is intended to prevent delays, harassment of the defendant by successive actions based on the same claim, and waste of judicial resources. N.C. R. Civ. P. 41 cmt.

AHMADI v. TRIANGLE RENT A CAR, INC.

[203 N.C. App. 360 (2010)]

The plain and unambiguous language of Rule 41(a)(1), however, does not require that a defendant be served in the prior two suits in order for the “two dismissal” rule to operate as a bar to a third successive suit based on the same claim. “If the General Assembly had intended to limit the rule’s application to cases where the defendant was [served in the two prior suits], it could have done so. There is simply no basis for judicially adding a requirement the General Assembly intended to leave out when the statute is clear [and] unambiguous.” *College Campus Apartments*, 94 N.C. App. at 284, 380 S.E.2d at 165-66.

II

[2] Plaintiff also assigns error to the trial court’s dismissing his complaint pursuant to Rule 12(b)(1) and 12(b)(6). In violation of Rule 28(b)(6) of the Rules of Appellate Procedure, plaintiff fails to cite any authority in support of his contentions. These assignments of error are, therefore, “taken as abandoned.” N.C. R. App. P. 28(b)(6). In any event, review of plaintiff’s arguments indicates that they are simply a reprise of his contentions that the trial court erred in dismissing his complaint pursuant to Rule 41(a)(1). As plaintiff fails to make any distinct argument for reversal under Rule 12(b), we conclude the trial court did not err in dismissing plaintiff’s complaint.

Affirmed.

Judges CALABRIA and HUNTER, Robert N., Jr., concur.

HOSSEIN AHMADI D/B/A HB AUTO SALES, PLAINTIFF V. TRIANGLE RENT A CAR,
INC. AND TRIANGLE RENT A CAR, LLC, DEFENDANTS

No. COA09-1299

(Filed 6 April 2010)

1. Contracts— breach of contract—summary judgment—failure to produce material facts

The trial court did not err by granting summary judgment in favor of defendants on a breach of contract claim. Plaintiff failed to present any evidence of a breach of contract when it was undisputed that plaintiff took possession of an automobile upon its sale and that he was provided with a proper title with the lien released following his purchase.

AHMADI v. TRIANGLE RENT A CAR, INC.

[203 N.C. App. 360 (2010)]

2. Appeal and Error— preservation of issues—failure to argue

Although plaintiff contends the trial court erred by granting summary judgment in favor of defendants on a breach of warranty claim, plaintiff abandoned this argument by failing to argue it in his brief as required by N.C. R. App. P. 28(b)(6).

3. Unfair Trade Practices— summary judgment—failure to produce material facts

The trial court did not err by granting summary judgment in favor of defendants on an unfair and deceptive trade practices claim. The uncontroverted evidence showed that plaintiff received a proper title for an automobile shortly after purchase, and for reasons unexplained in the record, a new title was not issued from the South Carolina Division of Motor Vehicles.

Appeal by plaintiff from order entered 10 June 2009 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 24 February 2010.

Benson & Brown, PLLC, by Drew Brown, for plaintiff-appellant.

Wallace & Nordan, LLP, by John R. Wallace and Joseph A. Newsome, for defendant-appellees.

STEELMAN, Judge.

Where plaintiff failed to present evidence, which indicated material issues of fact in response to defendants' motion for summary judgment, the trial court properly entered summary judgment in favor of defendants.

I. Factual and Procedural Background

Hossein Ahmadi (plaintiff), doing business as HB Auto Sales, was engaged in the business of the purchase and resale of automobiles. On 26 October 2005, plaintiff purchased a wrecked 2005 Jeep owned by Triangle Rent A Car, LLC, formerly Triangle Rent a Car, Inc. (defendants) at the Greensboro Auto Auction. Following payment by plaintiff, Greensboro Auto Auction delivered to plaintiff the title to the vehicle, bearing the signature of an authorized representative of defendants as sellers and a signature on behalf of the lien holder, RegionsBank, releasing its lien on the vehicle.

On 30 June 2006, nearly eight months later, plaintiff took the vehicle title to SunTrust Bank in Greensboro, where he obtained a loan

AHMADI v. TRIANGLE RENT A CAR, INC.

[203 N.C. App. 360 (2010)]

for \$20,000 using the vehicle title as collateral. SunTrust Bank submitted the title to the South Carolina Division of Motor Vehicles to have a new Certificate of Title issued in favor of plaintiff, with a lien noted on the title in favor of SunTrust Bank. For reasons that are not clear in the record, the South Carolina Division of Motor Vehicles failed to issue a new title or return the old one. In April 2007, plaintiff realized that a new title had not been returned to SunTrust and requested the assistance of Greensboro Auto Auction in obtaining a new title. In April 2008, Greensboro Auto Auction contacted defendants, and they assisted in obtaining a duplicate title.

On 26 September 2008, plaintiff filed a complaint against defendants alleging claims for breach of contract, breach of implied warranty of merchantability, and unfair and deceptive trade practices. On 10 June 2009, the trial court granted summary judgment in favor of defendants.

Plaintiff appeals.

II. Summary Judgment

In his only argument, plaintiff contends that the trial court committed reversible error when it granted defendants' motion for summary judgment on all of plaintiff's claims. We disagree.

A. Standard of Review

Our standard of review on appeal of a grant of summary judgment is *de novo*. See *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *Id.* at 523-24, 649 S.E.2d at 385 (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)). "Moreover, 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.'" *Id.* at 324, 649 S.E.2d at 385 (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)).

B. Analysis

1. Breach of Contract Claim

[1] "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omit-

AHMADI v. TRIANGLE RENT A CAR, INC.

[203 N.C. App. 360 (2010)]

ted). It is undisputed that a valid contract existed for the sale of the Jeep with proper title. However, plaintiff has failed to present any evidence of a breach of the contract. It is undisputed that plaintiff took possession of the Jeep upon its sale, and that he was provided with a proper title, with the lien released following his purchase.

Plaintiff argues that defendants breached the contract by failing to provide a proper title to the vehicle. Defendants submitted affidavits of two persons, including plaintiff's banker at SunTrust Bank, who stated that the vehicle title was in proper form when submitted to plaintiff. The record is not clear as to why there was a problem transferring the title in South Carolina. When asked in interrogatories to describe the defect in title, plaintiff responded: "The document was not valid. South Carolina DMV needed more information. It was completely deficient as it was not recognized by SC DMV." In light of the specific affidavits filed by defendants that the title was in proper order, this response was not sufficient to create a material issue of fact. Plaintiff points to the conclusory statement in his brother's affidavit of 2 June 2009 that: "Repeated representations were made by Triangle that they would resolve this issue." However, in his deposition, plaintiff was asked whether either he or his brother had spoken to Triangle from 26 October 2005 until the filing of the complaint about the vehicle. Plaintiff responded: "I really don't remember." A party is not permitted to file affidavits contradicting prior testimony for the purpose of creating an issue of fact. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, — N.C. App. —, —, 677 S.E.2d 465, 478 (2009) (quotation omitted), *stay granted*, 363 N.C. 580, *stay denied*, 363 N.C. 651 (2009). The trial court correctly granted defendant's motion for summary judgment.

2. Breach of Warranty Claim

[2] As to the breach of warranty claim contained in the complaint, plaintiff makes no argument in his brief that the dismissal of this claim was error. Any argument pertaining to the breach of warranty claim is thus deemed abandoned. N.C.R. App. P. 28(b)(6).

3. Unfair and Deceptive Trade Practices Claim

[3] "To establish a *prima facie* claim for unfair trade practices, the plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Tucker v. Blvd. at Piper Glen L.L.C.*, 150 N.C. App. 150, 153-54, 564

AHMADI v. TRIANGLE RENT A CAR, INC.

[203 N.C. App. 360 (2010)]

S.E.2d 248, 251 (2002) (citation omitted). Defendants presented affidavits from two persons, including plaintiff's banker, that the title to the vehicle was in proper order, with the lien released. As discussed above, plaintiff presented no evidence that the title was defective. Plaintiff's argument on appeal is based upon the "repeated representations" discussed above, and found to have no merit as to the breach of contract claim. Similarly, these arguments do not support plaintiff's claim for unfair and deceptive trade practices.

In summary judgment proceedings "once the moving party has submitted materials in support of the motion . . . the burden shifts to the opposing party to produce evidence establishing that the motion should not be granted." *Campbell v. Board of Educ. of Catawba Co.*, 76 N.C. App. 495, 497, 333 S.E.2d 507, 508-09 (1985) (citation omitted), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 878 (1986). " '[T]he opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment.' " *Id.* at 499, 333 S.E.2d at 510 (quoting *Conner Co. v. Spanish Inns*, 294 N.C. 661, 675, 242 S.E.2d 785, 793 (1978)). Plaintiff has failed to produce any material facts to support its claims for breach of contract, breach of implied warranty of merchantability, and unfair and deceptive trade practices. The uncontroverted evidence shows that plaintiff received a proper title for the Jeep shortly after purchase, and for reasons that are unexplained in the record, a new title was not issued from the South Carolina Division of Motor Vehicles. Defendants were entitled to summary judgment.

This argument is without merit.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

ALLEN v. CNTY. OF GRANVILLE

[203 N.C. App. 365 (2010)]

BERNICE G. ALLEN, ADMINISTRATOR OF THE ESTATE OF WILLIAM LEE ALLEN,
PLAINTIFF v. COUNTY OF GRANVILLE, GRANVILLE HEALTH SYSTEMS,
GRANVILLE MEDICAL CENTER, JOHN DOE AND JANE DOE, DEFENDANTS

No. COA09-957

(Filed 6 April 2010)

**Negligence—motion to dismiss—failure to supervise patient—
Rule 9(j) certification not required**

The trial court erred by granting defendant's motion to dismiss plaintiff's complaint based on its failure to include Rule 9(j) certification. Plaintiff's complaint alleging that defendant's failure to supervise a patient recently treated with seizures until a responsible adult was able to care for him was a claim of ordinary negligence rather than a claim for medical malpractice in furnishing or failure to furnish professional services in the performance of medical or other health care by a health care provider.

Appeal by plaintiff from order entered 9 March 2009 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 25 January 2010.

Bachman & Swanson, PLLC, by Glen D. Bachman, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by C. Houston Foppiano and Meredith Taylor Berard, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff appeals from an order granting defendants' motion to dismiss pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. Plaintiff's complaint alleges that on or about 4 August 2006, plaintiff's son, the decedent, was transported from his home to Granville Medical Center ("Medical Center") for medical treatment for a series of seizures. At around three o'clock in the morning, plaintiff was contacted by an employee of the Medical Center and advised that decedent was being discharged and that someone needed to pick him up from the emergency room. Plaintiff requested that the Medical Center not release her son until she was able to come pick him up as he "was disabled, had a history of seizures and could not come home on his own." Plaintiff also told the Medical Center employee that she would be unable to obtain transportation for several hours as it was

ALLEN v. CNTY. OF GRANVILLE

[203 N.C. App. 365 (2010)]

very early in the morning. When plaintiff arrived at the Medical Center, she was informed that the decedent had been released and left the emergency room. The decedent never returned home. In March 2007, decedent's remains were found in a ravine about a half of a mile from the Medical Center. Plaintiff filed a complaint sounding in negligence against the Medical Center, certain of its employees, Granville Health Systems, and Granville County. All defendants filed an answer and motion to dismiss based on plaintiff's lack of a certification under N.C.G.S. § 1A-1, Rule 9(j). The motion was granted and plaintiff gave notice of appeal.

Plaintiff's sole assignment of error is that the trial court erred in dismissing her complaint for its failure to assert that the alleged negligent medical care had been reviewed by an appropriate medical expert as required by N.C.G.S. § 1A-1, Rule 9(j). She contends her complaint alleges ordinary negligence rather than a claim for medical malpractice in "furnishing or failure to furnish professional services in the performance of medical . . . or other health care by a health care provider," N.C. Gen. Stat. § 90-21.11 (2009), and therefore, no Rule 9(j) certification was required. We agree.

"[A] plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*." *Phillips v. Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citations omitted), *aff'd per curiam and disc. review improvidently allowed*, 357 N.C. 576, 597 S.E.2d 669 (2003). "Whether an action is treated as a medical malpractice action or as a common law negligence action is determined by our statutes . . ." *Smith v. Serro*, 185 N.C. App. 524, 529, 648 S.E.2d 566, 569 (2007). As defined by N.C.G.S. § 90-21.11, a medical malpractice action is "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical . . . or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11. "Professional services has been defined by this Court to mean an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual." *Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998) (alterations in original and internal quotation marks omitted), *appeal after remand*, 140 N.C. App. 536, 537 S.E.2d 505 (2000).

ALLEN v. CNTY. OF GRANVILLE

[203 N.C. App. 365 (2010)]

“Our appellate courts have not clearly set forth the standard by which to review a trial court’s motion to dismiss pursuant to Rule 9(j). Nevertheless, when ruling on such a motion, a court must consider the facts relevant to Rule 9(j) and apply the law to them.” *Phillips*, 155 N.C. App. at 376, 573 S.E.2d at 602-03. “In determining whether or not Rule 9(j) certification is required, the North Carolina Supreme Court has held that pleadings have a binding effect as to the underlying theory of plaintiff’s negligence claim.” *Sturgill v. Ashe Mem’l Hosp., Inc.*, 186 N.C. App. 624, 628, 652 S.E.2d 302, 305 (2007) (internal quotation marks omitted), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008). Applying the facts as set forth above, we conclude that plaintiff’s factual allegations in her complaint do not allege a claim for medical malpractice so as to require a Rule 9(j) certification. Plaintiff makes no claim that the Medical Center failed to furnish professional services or provide treatment to the decedent, nor has she alleged that the decision by health care workers concerning decedent’s medical fitness after treatment was unsound. She has not claimed that the Medical Center “committed medical malpractice, breached [the] applicable standard of care or provided medical care” to the decedent. *Sharpe v. Worland*, 147 N.C. App. 782, 784, 557 S.E.2d 110, 112 (2001) (holding that, where the plaintiff failed to allege that the defendant hospital “committed medical malpractice, breached [the] applicable standard of care or provided medical care” and instead claimed only a breach of direct duties owed to the plaintiff by the hospital, ordinary negligence standards applied), *disc. review denied and supersedeas dismissed as moot*, 356 N.C. 615, 575 S.E.2d 27 (2002). In addition, read in context, plaintiff does not appear to challenge the Medical Center’s professional judgement in discharging the decedent. Rather, plaintiff alleges that the Medical Center failed to supervise a person in its care, despite being on notice that he could not care for himself, and permitted him to leave the premises without being accompanied by a responsible adult. This Court has determined that when a negligence claim “arises out of policy, management or administrative decisions,” it is “derived from ordinary negligence principles.” *Estate of Waters v. Jarman*, 144 N.C. App. 98, 103, 547 S.E.2d 142, 145, *disc. review denied*, 553 S.E.2d 213 (2001). In addition, this Court has found that failing to supervise a mentally and physically infirm patient while she smoked was ordinary negligence. *Taylor v. Vencor, Inc.*, 136 N.C. App. 528, 529, 530, 525 S.E.2d 201, 202, 203, *disc. review denied*, 351 N.C. 646, 543 S.E.2d 884, *disc. review denied*, 543 S.E.2d 889 (2000). Likewise, failing to supervise a patient recently treated with seizures until

MUSICK v. MUSICK

[203 N.C. App. 368 (2010)]

a responsible adult was able to care for him would also be a claim of ordinary negligence. Thus, the trial court erred in granting defendants' motion to dismiss.

Reversed.

Judges HUNTER and ERVIN concur.

SARAH CYNTHIA MUSICK, PLAINTIFF v. JOHN DAVID MUSICK, DEFENDANT

No. COA09-557

(Filed 6 April 2010)

Appeal and Error—interlocutory order—failure to show substantial right

Defendant's appeal from an interlocutory order denying his motions for a new trial and for relief from judgment or order brought under N.C.G.S. § 1A-1, Rules 59(a) and 60 in a divorce case appeal was dismissed. Defendant would not lose a substantial right if the permanent alimony order was not reviewed before final judgment on the equitable distribution claim since it affected only the financial repercussions of the parties' divorce.

Appeal by defendant from order entered 14 January 2009 by Judge Thomas G. Taylor in Gaston County District Court. Heard in the Court of Appeals 28 October 2009.

Carpenter & Carpenter, P.L.L.C., by James R. Carpenter, for plaintiff-appellee.

Deaton, Biggers & Hoza, P.L.L.C., by Lydia A. Hoza, for defendant-appellant.

CALABRIA, Judge.

John David Musick ("defendant") appeals an order denying his motions for a new trial and for relief from judgment or order brought pursuant to N.C. Gen. Stat. § 1A-1, Rules 59(a) and 60 (2007). We dismiss defendant's appeal as interlocutory.

MUSICK v. MUSICK

[203 N.C. App. 368 (2010)]

On 3 May 2005, Sarah Cynthia Musick (“plaintiff”) filed an action in Gaston County, North Carolina, seeking, *inter alia*, post-separation support (“PSS”), permanent alimony and equitable distribution. On 17 May 2006, plaintiff and defendant entered into a mediated settlement agreement in which defendant agreed to pay plaintiff monthly PSS in the amount of \$1,600.00. On 8 December 2006, plaintiff moved for a forensic accounting of the assets of defendant’s company. On 3 May 2007, the trial court entered a consent order granting plaintiff access to defendant’s personal and business financial records.

On 4 March 2008, the trial court entered a pre-trial order setting forth the issues of alimony and equitable distribution to be heard during the week of 26 May 2008. However, the case was not heard until the week of 3 September 2008. The trial court, over defendant’s objection, continued the matter of equitable distribution and proceeded to hear plaintiff’s alimony claim. Following the hearing, the trial court concluded that plaintiff was a dependent spouse, defendant was a supporting spouse, and ordered defendant to pay plaintiff monthly alimony in the amount of \$3,500.00. Plaintiff’s claim for attorney’s fees was to be heard at a later date.

In a letter dated 5 September 2008 to defendant’s counsel, the trial court requested a response regarding any objections, requests for additions, or corrections to a proposed permanent alimony order. The trial court gave defendant’s counsel fourteen days to respond. On 15 September 2008, the trial court ordered defendant to pay \$3,500.00 in monthly alimony as well as \$9,240.00 for attorney’s fees. The order specifically reserved the parties’ equitable distribution claims for a later hearing.

On 23 September 2008, defendant moved for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (a)(1), (7), and (9) (2007) (“Rule 59”) and moved for relief from the order requiring him to pay plaintiff’s attorney’s fees, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) and (6) (2007) (“Rule 60”). On that day, defendant also filed a notice of Objection and Exception to the permanent alimony order. On 14 January 2009, the trial court denied defendant’s motions. Defendant appeals.

Defendant argues the trial court erred in denying his Rule 59 motion for a new trial and his motion for relief from judgment or order brought pursuant to Rule 60. The threshold issue to be addressed is whether defendant’s appeal is premature.

MUSICK v. MUSICK

[203 N.C. App. 368 (2010)]

“Although the parties have not raised this issue, whether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*.” *Webb v. Webb*, — N.C. App. —, —, 677 S.E.2d 462, 463 (2009) (internal quotations, citations and brackets omitted). “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *McIntyre v. McIntyre*, 175 N.C. App. 558, 561-62, 623 S.E.2d 828, 831 (2006) (quoting *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)).

While a final judgment is always appealable, an interlocutory order may be appealed immediately only if (i) the trial court certifies the case for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b), or (ii) the order “affects a substantial right of the appellant that would be lost without immediate review.”

Id. at 562, 623 S.E.2d at 831 (quoting *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 261 (2001)). The trial court did not certify the order pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Therefore, defendant’s right to an immediate appeal, if one exists, depends on whether the trial court’s order denying his motions affects a substantial right.

“A substantial right is one which will clearly be lost or irretrievably adversely affected if the order is not reviewable before final judgment.” *Embler*, 143 N.C. App. at 165, 545 S.E.2d at 262 (internal quotations and citation omitted). “Whether an interlocutory appeal affects a substantial right is determined on a case by case basis.” *Id.* at 166, 545 S.E.2d at 262 (citation omitted).

The decisions of our Courts make clear that an appeal of an equitable distribution order that explicitly leaves open the issue of alimony does not affect a substantial right because “[i]nterlocutory appeals that challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right.” *Id.* (citations omitted). *See also Webb*, — N.C. App. at —, 677 S.E.2d at 464-65 (trial court’s order awarding permanent alimony but leaving open another pending issue is interlocutory and does not affect a substantial right). Since the permanent alimony order affects only the financial repercussions of the parties’ divorce, denying defendant’s Rule 59 and 60 motions and proceeding with the equitable distribution hearing will not cause his rights to clearly be lost or irretrievably affected. *Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262.

MUSICK v. MUSICK

[203 N.C. App. 368 (2010)]

Therefore, plaintiff's appeal of the permanent alimony order is not properly before us.

We note that defendant did not appeal from the permanent alimony order, but instead appealed from the order denying his Rule 59 and 60 motions. However, "[i]t is settled law that erroneous judgments may be corrected only by appeal[.]" *McKyer v. McKyer*, 182 N.C. App. 456, 460, 642 S.E.2d 527, 530 (2007) (quoting *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981)). Neither a Rule 59 motion nor a Rule 60 motion may be used as a substitute for an appeal. *Davis v. Davis*, 360 N.C. 518, 526, 631 S.E.2d 114, 120 (2006). The denial of defendant's Rule 59 and 60 motions does not alter the interlocutory nature of the underlying permanent alimony order.

Accordingly, because defendant will not lose a substantial right if the permanent alimony order is not reviewed before final judgment, we hold that his appeal is premature, and therefore dismiss his appeal as interlocutory.

Dismissed.

Judges HUNTER, Robert C. and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 APRIL 2010)

BABBERT v. SANDERS FORD No. 09-831	Indus. Comm. (676214)	Affirmed
BENNETT v. EQUITY RESIDENTIAL No. 09-878	Wake (07CVS7074)	Affirmed
DAILY EXPRESS, INC. v. N.C. DEP'T OF CRIME No. 09-1174	Wake (06CVS15962)	Reversed
EARTHMOVERS EQUIP. v. N.C. DEP'T CRIME CONTROL No. 09-1175	Wake (07CVS5022)	Reversed
EDGERTON v. WYTHE ADVANTAGE No. 09-1268	Indus. Comm. (791216)	Affirmed
GRAY v. BRYANT No. 09-749	Lee (08CVS1156)	Affirmed
HARRISON v. LANDS END OF EMERALD ISLE No. 09-215	Carteret (05CVS1154)	Affirmed
HATLEY v. CONT'L GEN. TIRE No. 09-971	Indus. Comm. (569479)	Affirmed
IN RE A.B. No. 09-995	Guilford (08JB772)	Affirmed
IN RE A.N.G. No. 09-1365	Randolph (06JT157) (06JT159) (07JT50)	Affirmed
IN RE B.E. & B.E. No. 09-1532	Chatham (03JT23-24)	Reversed and Remanded
IN RE B.L.H. & Z.L.H. No. 09-1355	Buncombe (09JT255-256)	Affirmed
IN RE D.J.J.H. No. 09-1366	Lincoln (07JT29)	Affirmed
JOYNER v. BOWEN No. 09-250	Nash (07CVD1829)	Affirmed
KEEN TRANSP., INC. v. N.C. DEP'T OF CRIME CONTROL No. 09-1176	Wake (07CVS12922)	Reversed

MILLER & LONG v. INTRACOASTAL LIVING No. 09-671	Brunswick (07CVS1760)	Dismissed
OSMAN v. REESE No. 09-950	Guilford (08CVS1146)	Affirmed
PIEDMONT AREA MENTAL v. CITY OF MONROE No. 09-683	Union (08CVS2567)	Dismissed
RAYMOND v. N.C. POLICE BENEVOLENT ASSOC. No. 09-797	Buncombe (08CVS4456)	Affirmed
SCOTT v. N.C. DEP'T OF CORR. No. 09-1090	Indus. Comm. (TA-20478)	Affirmed
STATE v. ANDERSON No. 09-911	Pitt (07CRS61214) (07CRS61215) (07CRS61211)	No Error
STATE v. BATTS No. 09-1012	Duplin (08CRS50342) (08CRS50345) (08CRS3761)	No Error
STATE v. BELTRAN-PONCE No. 09-79	Buncombe (08CRS347) (08CRS52417)	No Error
STATE v. BLOW No. 09-633	Wake (03CRS30991) (03CRS30990) (02CRS59687)	Affirmed
STATE v. BROOKS No. 09-1035	Stanly (05CRS248) (04CRS52365)	No Error
STATE v. BROWN No. 09-997	Cabarrus (08CRS10706)	Affirmed
STATE v. CAPPS No. 09-1011	Rockingham (07CRS4384)	No Error
STATE v. CHAMBERS No. 09-733	Wake (07CRS75092) (07CRS75023)	Affirmed
STATE v. CROOMS No. 09-1053	Carteret (07CRS50598-50601)	Affirmed
STATE v. FRITZ No. 09-861	Wayne (08CRS50720)	No Error

STATE v. GRANGE No. 09-605	Durham (06CRS54275) (06CRS54280) (06CRS54277) (06CRS54274) (06CRS54278)	No Error
STATE v. HIGHTOWER No. 09-865	Caswell (08CRS819) (08CRS820) (08CRS818) (08CRS821)	No Error
STATE v. LEWIS No. 09-830	Surry (07CRS2104)	No Error
STATE v. MASSENBURG No. 09-719	Wake (07CRS45619) (07CRS47675) (07CRS45616)	No Error
STATE v. PARKS No. 09-953	Cleveland (06CRS6595-7)	No Error
STATE v. PERSON No. 09-989	Wake (07CRS52601)	No Error
STATE v. ROYSTER No. 09-1111	Mecklenburg (08CRS23358-9)	No Error
STATE v. SMITH No. 09-681	Cabarrus (08CRS1626) (08CRS1625)	No prejudicial error
STATE v. STEVENS No. 09-1091	Wake (07CRS42960)	No Error
STATE v. TELLEZ No. 09-1010	Forsyth (08CRS51053)	No prejudicial error
TOWN OF LELAND, N.C. v. HWW, LLC No. 08-987-2	Brunswick (07CVS2440)	Remanded
VALLEY TRANSP. v. N.C. DEP'T OF CRIME CONTROL No. 09-1177	Wake (07CVS12921)	Reversed
W. SIDE HEAVY v. N.C. DEP'T OF CRIME CONTROL No. 09-1178	Wake (07CVS12920)	Reversed

STATE v. CURRY

[203 N.C. App. 375 (2010)]

STATE OF NORTH CAROLINA v. MARTAVIOUS SANTONIO CURRY, DEFENDANT

No. COA09-547

(Filed 20 April 2010)

1. Homicide—felony murder—merger—conviction arrested—sentence imposed not prejudicial

The trial court erred by not merging Defendant's robbery conviction into his conviction for first-degree murder and defendant's robbery conviction was arrested. However, defendant was not prejudiced as the felony upon which defendant's murder conviction was based was the robbery and the trial court consolidated the two convictions and imposed a life sentence, which was required for the murder conviction.

2. Sentencing—discharging a firearm into an occupied dwelling—clerical no error

The trial court did not err in sentencing defendant for a Class D rather than a Class E felony for his conviction of discharging a firearm into occupied property. The terms "dwelling" and "residence" are synonymous in the context of this case and the indictment and the jury instructions were sufficient to charge defendant with a Class D felony under N.C.G.S. § 14-34.1(b). Defendant's judgment was remanded for correction of a clerical error.

3. Appeal and Error—preservation of issues—failure to raise issue of fatal variance at trial

Defendant failed to argue a variance between his indictment for possession of a firearm and the evidence presented at trial or even to argue generally the sufficiency of the evidence regarding the type of firearm or weapon possessed to the trial court. Thus, he waived this issue for appeal.

4. Appeal and Error—preservation of issues—failure to object and move to strike

Defendant's argument that the trial court erred in admitting certain testimony into evidence was overruled. Defendant waived his objection to certain testimony by objecting to the testimony only after it was given and failing to make a motion to strike.

STATE v. CURRY

[203 N.C. App. 375 (2010)]

5. Appeal and Error— preservation of issues—failure to include order in record on appeal—failure to object

Defendant's contention that the trial court erred in admitting testimony that defendant had been on probation was overruled where the sole argument on appeal was based on an alleged order by the trial court which was not included in the record on appeal. Defendant also failed to object to the testimony at trial on the basis that it was beyond the scope permitted by the trial court's earlier ruling.

6. Evidence— prior crimes or bad acts—not plain error

The trial court did not commit plain error in allowing into evidence testimony that defendant had been incarcerated shortly before the shooting and was on probation because the State presented substantial evidence of the crimes charged in this case and even if the testimony was erroneously admitted, defendant failed to show that the jury probably would have reached a different result had the error not occurred.

7. Appeal and Error— preservation of issues—failure to object to evidence at trial

Defendant failed to timely object to the admission of certain evidence at trial and failed to argue plain error on appeal. Defendant thus failed to preserve for appellate review issues concerning the admission of evidence.

8. Evidence— hearsay—not plain error

Even assuming *arguendo* that the trial court erred in allowing into evidence hearsay testimony regarding defendant's pre-trial identification in a photographic lineup, in light of the State's evidence the jury probably would not have reached a different result had the error not occurred.

9. Homicide— felony murder—sufficient evidence—motion to dismiss properly granted

The trial court did not err by denying defendant's motion to dismiss robbery and murder charges as the State presented sufficient evidence of each element of the crimes.

Judge BEASLEY concurs with separate opinion.

Appeal by defendant from judgments entered on or about 29 May 2008 by Judge David S. Cayer in Superior Court, Cleveland County. Heard in the Court of Appeals 15 October 2009.

STATE v. CURRY

[203 N.C. App. 375 (2010)]

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of first degree murder, discharging a firearm into occupied property, possession of a firearm by a felon, and robbery with a dangerous weapon. Defendant appeals on numerous grounds. For the following reasons, we arrest judgment on defendant's sentence for robbery with a dangerous weapon, remand as to defendant's judgment for discharging a firearm into occupied property for correction of a clerical error, and otherwise find no prejudicial error.

I. Background

The State's evidence tended to show that on 5 December 2006, defendant told his friend, Montrell Archie, that "he needed somebody to rob" because he had no money. Mr. Archie informed defendant he did not know of anyone, and defendant asked about Durrell Petty, an individual from whom Mr. Archie purchased his illegal drugs. Defendant and Mr. Archie decided they would commit a robbery that evening but changed their minds as they did not have a gun. Mr. Archie spent the night at his girlfriend's house, and defendant stayed at Mr. Archie's grandmother's house. On the morning of 6 December 2006, Mr. Archie drove to his grandmother's house and picked up defendant. Mr. Archie and defendant got an SKS rifle, and the two formulated a plan on "how to do the robbery[.]" Mr. Archie drove defendant to an area near Mr. Petty's house and dropped him off so that "it look[ed] like [Mr. Archie] didn't know what was going on[.]" Mr. Archie then drove to Mr. Petty's house and purchased some drugs from Mr. Petty. While at Mr. Petty's house, Mr. Archie saw defendant "come up on the car porch." Mr. Petty ran, and defendant fired a gun. Ms. McSwain, Mr. Petty's girlfriend, was also at the house with Mr. Archie and Mr. Petty. When Ms. McSwain heard the gunshot, she ran. At the time of the shooting, Ms. McSwain owned a pocketbook which contained money and her identification. During the shooting, Mr. Archie hid in the pantry and "continued hearing shots." Defendant "opened the pantry and pointed the gun" at Mr. Archie, asking where Mr. Petty was and telling Mr. Archie to search the house. Mr. Archie found Mr. Petty, who had already been shot, in the bedroom and "it

STATE v. CURRY

[203 N.C. App. 375 (2010)]

didn't look like he was alive[.]” Mr. Archie then took a 9 millimeter handgun from Mr. Petty.

Sergeant Dan Snellings of the Cleveland County Sheriff's Office reported to the crime scene and later went to a nearby unoccupied residence. At the vacant residence law enforcement personnel recovered an SKS rifle and a purse which contained Ms. McSwain's identification. Defendant was indicted for murder, discharging a firearm into occupied property, possession of a firearm by a convicted felon, and robbery with a dangerous weapon. Defendant was convicted by a jury on all charges. The trial court determined that defendant had a prior record level of two and sentenced him to life imprisonment without parole on his consolidated convictions for murder and robbery with a dangerous weapon. Defendant was also sentenced to 77 to 102 months for discharging a firearm into occupied property and 15 to 18 months for possession of a firearm by a convicted felon. Defendant appeals on numerous grounds. For the following reasons, we arrest judgment on defendant's sentence for robbery with a dangerous weapon, remand as to defendant's judgment for discharging a firearm into occupied property for correction of a clerical error, and otherwise find no prejudicial error.

II. Merger

[1] Defendant first argues that pursuant to *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988), his robbery conviction merged into his murder conviction, and thus the trial court erred in not arresting judgment as to his robbery conviction; the State agrees with defendant on this contention. However, defendant also argues that due to this error and pursuant to *State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987), his “murder case must be remanded for entry of proper judgment.” The State contends that defendant's “sentence imposed for the felony murder was not possibly enhanced by the robbery conviction and a remand would be pointless. Instead this Court should follow the practice in *State v. Goldston*, 343 N.C. 501, 471 S.E.2d 412 (1996)[.]”

Whether to arrest judgment is a question of law, and “[q]uestions of law are reviewed *de novo* on appeal.” *Metcalf v. Black Dog Realty, LLC*, — N.C. App. —, —, 684 S.E.2d 709, 720 (2009) (citation omitted).

Wortham states:

Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on

STATE v. CURRY

[203 N.C. App. 375 (2010)]

the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

Wortham at 674, 351 S.E.2d at 297. Thus, *Wortham's* analysis would apply in cases where "a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed[.]" *Id.* However, here, as in *Goldston*, we do not find that to be the case:

The felony upon which the first-degree murder conviction was based in this case was the attempted robbery with a firearm. The jury did not convict the defendant based on premeditation and deliberation, and the attempted robbery conviction merged into the felony murder conviction. Therefore, judgment should have been arrested on the attempted robbery with a firearm conviction. The court consolidated the murder and attempted robbery with a firearm convictions and imposed a life sentence, which was required for the murder conviction. The defendant was thus not prejudiced by this consolidation. Accordingly, we arrest judgment on the sentence for attempted robbery with a firearm and do not disturb the sentence for felony murder.

Goldston at 504, 471 S.E.2d at 414 (citation omitted). As our facts are virtually the same as in *Goldston* and defendant did not receive a harsher punishment based upon the error, we too "arrest judgment on the sentence for . . . robbery with a firearm and do not disturb the sentence for felony murder." *Id.*

III. Sentencing

[2] Defendant next contends that "the existing judgment must be vacated and the case remanded for a new entry of judgment and sentencing hearing because the Trial Court erroneously entered judgment and sentenced on the conviction [of discharging a firearm into occupied property] as a Class D rather than a Class E felony." Defendant directs our attention to alleged errors in his indictment, the jury instructions, the verdict sheet, the trial court's statements during sentencing, and the judgment itself in support of his contention that he should have been sentenced on a Class E felony instead of a Class D felony.

In order to determine the proper standard of review, it is important to note the basis of defendant's argument. Defendant *did not*

STATE v. CURRY

[203 N.C. App. 375 (2010)]

assign nor argue error as to the indictment, the jury instructions, the verdict sheet or the trial court's statement, but merely uses them in support of his argument that the trial court sentenced him improperly. Defendant is *not* arguing that his indictment was insufficient, that the jury instructions were improper, that the verdict sheet was deficient or that the trial court's statement was prejudicial, nor could he do so, as he failed to assign as error or argue these issues. Defendant is attacking only his *sentencing*.

"When a defendant assigns error to the sentence imposed by the trial court our standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006) (citation and brackets omitted), *disc. review denied*, 361 N.C. 222, 642 S.E.2d 709 (2007). N.C. Gen. Stat. § 14-34.1 provides:

(a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

(b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is in operation is guilty of a Class D felony.

(c) If a person violates this section and the violation results in serious bodily injury to any person, the person is guilty of a Class C felony.

N.C. Gen. Stat. § 14-34.1 (2005).

A. Indictment

We first turn to defendant's indictment, which defendant contends supports his argument that he should have been sentenced as a Class E felon. Defendant was indicted for "[d]ischarging a firearm into occupied property" pursuant to N.C. Gen. Stat. § 14-34.1. The indictment identified the crime charged as a class E felony, although the grand jury specifically found that defendant "unlawfully, willfully and feloniously did wantonly discharge a firearm into a *residence* located at 6035 Deep Green Drive, Shelby, North Carolina, and said property being occupied when the weapon was discharged."

STATE v. CURRY

[203 N.C. App. 375 (2010)]

Discharge of a weapon into a “building” or “structure” while it is occupied is a Class E felony pursuant to N.C. Gen. Stat. § 14-34.1(a), but discharge of a weapon into a “dwelling” while it is occupied is a class D felony pursuant to N.C. Gen. Stat. § 14-34.1(b). *See id.* Defendant argues that because the indictment alleges that he discharged the weapon into an occupied “residence” rather than a “dwelling,” the indictment did not charge him with a Class D felony and he is entitled to resentencing upon a Class E felony. We disagree.

“[A]n indictment is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all essential elements of the crime.” *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008) (citation omitted), *aff’d per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009). “Even though [a] statutory reference [is] incorrect, the body of the indictment [may be] sufficient to properly charge a violation. The mere fact that the wrong statutory reference was used does not constitute a fatal defect as to the validity of the indictment.” *State v. Jones*, 110 N.C. App. 289, 291, 429 S.E.2d 410, 412 (1993). The elements of discharging a firearm into occupied property “are (1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied.” *State v. Hagans*, 188 N.C. App. 799, 804, 656 S.E.2d 704, 707 (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 511, 668 S.E.2d 344 (2008).

Here, the offense was listed as “[d]ischarging a firearm into occupied property” and the description on the indictment was for “[(1) wantonly discharg[ing] [(2)] a firearm [(3)] into a residence located at 6035 Deep Green Drive, Shelby, North Carolina, and [(4)] said property being occupied when the weapon was discharged.” *See id.* The grand jury alleged that defendant fired into occupied property which was a “residence.” The word “residence” is not used in either N.C. Gen. Stat. § 14-34.1(a) or (b). However, *State v. Jones*, 188 N.C. App. 562, 655 S.E.2d 915 (2008) refers to a “dwelling house” or a “residence” numerous times, indicating that the words are interchangeable. *Jones*, 188 at 564-68, 655 S.E.2d at 917-19. Black’s Law Dictionary defines a “dwelling-house” as “[t]he house or other structure in which a person lives; a *residence* or abode.” Black’s Law Dictionary 582 (9th ed. 2009) (emphasis added). “Residence” has also been defined as “a building used as a home: DWELLING[.]” Merriam-Webster’s Collegiate Dictionary 1060 (11th ed. 2005). Furthermore, N.C. Gen. Stat. § 14-277.4A, also located in Chapter 14, the criminal law chapter of the North Carolina General Statutes, defines “resi-

STATE v. CURRY

[203 N.C. App. 375 (2010)]

dence” as “any single-family or multifamily *dwelling* unit that is not being used as a targeted occupant’s sole place of business or as a place of public meeting.” N.C. Gen. Stat. § 14-277.4A(a)(1) (2009) (emphasis added). Thus, we conclude that the term “residence” as used in the indictment was synonymous with “dwelling” as used in N.C. Gen. Stat. § 14-34.1(b). Though the crime was listed as a Class E felony on defendant’s indictment, the specific description of the crime put defendant on notice that the crime charged was actually a Class D felony under N.C. Gen. Stat. § 14-34.1(b). The indictment was clearly sufficient to enable defendant to prepare for trial. *See State v. Farrar*, 361 N.C. 675, 678, 651 S.E.2d 865, 866-67 (2007) (“[T]he primary purpose of the indictment is to enable the accused to prepare for trial.” (citation and quotation marks omitted)). Also, as noted above, even where a “statutory reference [is] incorrect, the body of the indictment [may be] sufficient to properly charge a violation.” *Jones*, 110 N.C. App. at 291, 429 S.E.2d at 412. Because the term “residence” is synonymous with the term “dwelling” as used in N.C. Gen. Stat. § 14-34.1(b), the body of the indictment charged defendant with a Class D felony pursuant to N.C. Gen. Stat. § 14-34.1(b). *See* N.C. Gen. Stat. § 14-34.1(b). The erroneous reference on the indictment to a Class E felony therefore does not support defendant’s argument that he was improperly sentenced.

B. Jury Instructions

Defendant next argues that “[t]he jury instructions on the offense consistently used the word ‘residence’ and charged an essential element was discharging a firearm ‘into the residence’ on Deep Green Drive” while the jury instruction should have referred to a “dwelling” instead. However, as discussed above, we find that the terms “dwelling” and “residence” are synonymous in this context, and thus the trial court did not err by sentencing defendant for a Class D felony pursuant to N.C. Gen. Stat. § 14-34.1(b).

C. Verdict Sheet

Defendant also argues that he should have been sentenced to a Class E felony instead of a Class D felony based upon the verdict sheet. On the verdict sheet, the jury found defendant “guilty of discharging a firearm into occupied property[.]” (Original in all caps.) The only other option on the verdict sheet was “NOT GUILTY[.]” However, the wording of the verdict sheet does not change our analysis as stated above. “[T]he function of the jury during the guilt phase is to determine the guilt or innocence of the defendant, not to be con-

STATE v. CURRY

[203 N.C. App. 375 (2010)]

cerned about the defendant's penalty[.]” *State v. Brown*, 177 N.C. App. 177, 189, 628 S.E.2d 787, 794 (2006) (citation, quotation marks, and brackets omitted). Here, defendant argues only that the penalty was improper, not the jury's verdict itself. In the context of the indictment and jury instructions as noted above, the fact that the verdict sheet referred to an “occupied property” does not raise any question about whether the jury properly performed its function. The jury made the factual determination as to the defendant's guilt; the trial court properly determined the penalty pursuant to N.C. Gen. Stat. § 14-34.1(b).

D. Trial Court's Statements

During sentencing the trial court stated, “On a discharging a firearm into occupied dwelling, he's Class *E*, Level 2, I'll impose a minimum of 77 and a maximum of 102 months in the Department of Correction[.]. Here, it is clear that the trial court simply misspoke as to the class of the felony. First, the trial court noted defendant was being sentenced for “discharging a firearm into occupied *dwelling*,” which is the language used in N.C. Gen. Stat. § 14-34.1(b). *See* N.C. Gen. Stat. § 14-34.1(b). Second, the trial court imposed “a minimum of 77 and a maximum of 102 months in the Department of Correction[.]” The range of 77 to 102 months falls only within the minimum and maximum range for a Class D offense. *See* N.C. Gen. Stat. § 15A-1340.17 (c), (e) (2005). For a Class E felony the maximum sentence defendant could have received is 44 months. *See* N.C. Gen. Stat. § 15A-1340.17(e). Thus, the trial court was clearly referring to a Class D offense, though he erroneously stated “Class E[.]”

E. Judgment

Lastly, on the “JUDGMENT AND COMMITMENT ACTIVE PUNISHMENT FELONY” sheet, the trial court described the offense as “DISCHARGE WEAPON OCCUPIED PROP” noting that it was pursuant to N.C. Gen. Stat. § 14-34.1(a) and was a Class D offense. Here it appears that the trial court made a typographical error, as a violation of N.C. Gen. Stat. § 14-34.1(a) is a Class E offense, and a violation of N.C. Gen. Stat. § 14-34.1(b) is a Class D offense. The trial court sentenced defendant to 77 to 102 months imprisonment, which is consistent with a class D offense. *See* N.C. Gen. Stat. § 15A-1340.17 (c), (e).

“A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” *In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006) (citation,

STATE v. CURRY

[203 N.C. App. 375 (2010)]

quotation marks, and brackets omitted). “When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record ‘speak the truth.” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted).

On the judgment, the trial court noted that defendant was being sentenced for a Class D offense, and then sentenced defendant accordingly. Therefore, the trial court’s reference to subsection (a) of N.C. Gen. Stat. § 14-34.1 was merely a “clerical error” and did not affect the sentencing defendant received. We remand defendant’s judgment for discharging a weapon into occupied property for correction of this clerical error. *See id.*

IV. Indictment

[3] Defendant next contends that his “possession of a firearm conviction must be vacated because there is a fatal variance between the indictment and the evidence concerning the type of weapon possessed under *State v. Langley*, 173 N.C. App. 194, 618 S.E.2d 253 (2005)[.]” The State contends that defendant has waived this argument by failing to properly raise this issue in the trial court below. Defendant counters that “[i]t is black letter law in North Carolina that a defendant ‘may raise the question of variance between the indictment and the proof by a motion of nonsuit.’ *State v. Skinner*, 162 N.C. App. 434, 446, 590 S.E.2d 876, 885 (2004).” We agree that “defendant may raise the question of variance between the indictment and the proof by a motion” to dismiss, but defendant must also state this at trial as the grounds for the motion to dismiss. *See State v. Skinner*, 162 N.C. App. 434, 446, 590 S.E.2d 876, 885 (2004). In *State v. Skinner*, the sentence following the one quoted in defendant’s brief is: “the defendant moved to dismiss the assault charge *on this ground* at the close of the State’s evidence and renewed his motion at the close of all the evidence.” *Id.* (emphasis added). “[O]n this ground” is obviously referring to the “variance between the indictment and the proof” presented at trial. *Id.* In the case *sub judice*, defendant’s motion to dismiss after the close of the State’s evidence was not based upon the indictment. Instead, as to the charge for possession of a firearm by a felon, defense counsel argued that the State’s evidence of defendant’s prior felony conviction was insufficient. Over approximately a one page argument of the transcript, defendant’s argument regarding this conviction was:

STATE v. CURRY

[203 N.C. App. 375 (2010)]

At this point, what I would ask The Court to consider the firearm by a felon charge, Your Honor. At this point, the only evidence before The Court is Ms. Pharr's testimony from the probation file that he was charged with assault with a deadly weapon inflicting serious injury. There is no substantiating court documentation from the clerk's office, the A.O.C., the Department of Corrections, anything of that nature, just her statement blankly, not even clarifying what level or what type of charge it is, just that he was placed on probation for it.

In 15(a)1340.14, Your Honor, that's the prior record level sentencing section of the North Carolina General Statutes. Subsection (e), or excuse me, subsection 7(e), states that and discusses—or subsection (f), section (f), excuse me, proof of prior convictions. And it specifies that the methods of proving prior convictions, stipulation of the parties, an original copy of the court record of the prior conviction, court records maintained by a division of criminal information, the Department of Motor Vehicles or the Administrative Office of the Court. There's a catch-all provision at the end, and I'll simply say at this point that that type of documentation is not before The Court. It's just a statement from a probation officer as to the underlying charge that he was placed on probation for.

I would say, Your Honor, that that is not sufficient to go forward on that case at this point, and ask you to dismiss that charge. I'll ask you to dismiss all the charges without any further argument, and ask you to dismiss that charge based on that argument, Your Honor.

At the close of all of the evidence defendant stated,

... At the close of all the evidence, Your Honor, I would renew my motions to dismiss, again, as far as the murder, robbery and discharging a weapon charge, based on the insufficiency of the evidence. And as far as the firearm by a felon charge, again, my recollection is—my recollection, I have it in my notes that Ms. Pharr mentioned that it was a felony charge. I do not wish to be heard any further, Your Honor.

As defendant failed to argue a variance between his indictment and the evidence presented at trial or even to argue generally the sufficiency of the evidence regarding the type of firearm or weapon possessed to the trial court, he has waived this issue for appeal. *See*

STATE v. CURRY

[203 N.C. App. 375 (2010)]

N.C.R. App. P. 10(b)(1) (“In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”); *State v. Tellez*, — N.C. App. —, —, 684 S.E.2d 733, 736 (2009) (“It is well-established that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.” (citations and quotation marks omitted)); *see also State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195 (“Defendant moved to dismiss the habitual felon charge based upon double jeopardy and not based upon a variance between the indictment and proof. Defendant waived his right to raise this issue by failing to raise the issue at trial. N.C.R. App. P. 10(b)(1). We therefore decline to address the issue.”), *cert. denied*, 341 N.C. 653, 462 S.E.2d 518 (1995). This argument is overruled.

V. Evidentiary Issues

Defendant’s next five arguments concern evidence that the trial court admitted about him through various witnesses.

A. Montrell Archie’s Testimony

[4] Defendant first directs our attention to Mr. Archie’s testimony:

Q. Okay. While you and Martavious Curry were becoming friends, what type of activities did you all participate in? And I’m talking about such as playing cards, going to the movies, generally, what types of things did you all do together to become friends?

A. We just hung out. You know what I’m saying? Just hang out, sell drugs.

MR. ANTHONY: Objection.

THE COURT: Overruled.

MR. YOUNG: I did not hear The Court’s ruling.

THE COURT: Overruled.

MR. YOUNG: Okay.

Q. You hung out and what?

A. We basically just hung out, smoked weed and sold drugs.

STATE v. CURRY

[203 N.C. App. 375 (2010)]

We first note that defendant's counsel objected *after* the witness had answered the question, and he failed to make a motion to strike; thus, defendant waived this objection. *See State v. Burgin*, 313 N.C. 404, 409, 329 S.E.2d 653, 657 (1985) ("The one objection made was lodged after the witness responded to the question. Defendant made no motion to strike the answer, and therefore waived the objection." (citations omitted)). Furthermore, when the State repeated the question, defendant failed to object to either the question or the answer; this too would waive defendant's previous objection. *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985) ("Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence." (citations omitted)). Lastly, although defendant's objections have been waived, we note that defendant raised plain error in his assignment of error but failed to argue it in his brief. *See N.C.R. App. P. 10(c)(4)* (In order to preserve an argument pursuant to plain error defendant must "specifically and distinctly" argue it.); *N.C.R. App. P. 28(b)(6)* ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). This argument is overruled.

B. Probation Officer Lecia Pharr's Testimony

[5] Defendant next contends that the trial court erred in admitting the testimony of probation officer Lecia Pharr who testified that defendant had been on probation. Defendant specifically argues that Ms. Pharr was erroneously allowed to testify regarding the following facts:

1) defendant was placed on probation in October 2005 for a criminal conviction; 2) defendant was on probation during 2005-06; 3) defendant was actively supervised by the Gaston County probation department and a probation officer in the summer and fall of 2006; and 4) defendant was on probation on December 6, 2006 at the time of the charged offense.

Before trial began, defendant filed a "motion in limine to prohibit testimony regarding defendant being on probation and previously being incarcerated[.]" (Original in all caps.) Defendant argued that "[a]dmission of such testimony would violate Evidence rules 404(b), 608, 609 and 403." Defendant argues in his brief that "the Trial Court denied defendant's objection" as to Ms. Pharr's testimony *after voir dire*. However, defendant's characterization of the trial court's action is not accurate.

STATE v. CURRY

[203 N.C. App. 375 (2010)]

On the day defendant's case was called for trial, the trial court stated, "And we had discussed in chambers that the Defendant had a motion in limine, that I think we reached the agreement that at such time that if the State may be offering that evidence that the district attorney will let me know, and I'll hear from Mr. Anthony." When the State announced its next witness was Ms. Pharr, the trial court sent the jury out and allowed voir dire examination. Defendant objected to any testimony which was "out of the scope of Judge Bridges' earlier ruling. He was very specific and Mr. Young's request was very specific at that point, for address, phone number and appointments he kept. That was the three things we addressed at the earlier hearing." The trial court did not "deny" defendant's objection, but sustained it in part and overruled it in part. The trial court specifically limited Ms. Pharr's testimony stating,

I'll allow Ms. Pharr to testify what her job is. I don't want to get into the details of the job or the fact that she's a supervisor, a supervising probation officer. I'll allow her to testify to the conviction and the date of the conviction, which I heard her say is October 18 of '05, assault with a deadly weapon inflicting serious injury, in Cleveland County. I'll allow her to testify that he gave an address of 309 Biggers Street. I'll allow her to testify that he reported on December 6th and December 7th.

....

I'll allow her to testify to that [phone] number. Now, otherwise, I'll sustain the objection. I don't want her to get into probation, terms of probation, sentence, any alleged violations. I'm going to sustain the objection to that.

Ms. Pharr then testified before the jury without any additional objection from defendant.

We first note that we have no record of any order or ruling from Judge Bridges in the record before this Court. We cannot speculate as to what was argued before Judge Bridges or what Judge Bridges' ruling was. Defendant's sole argument at trial concerned Judge Bridges' order, which was not provided to us in the record, so we cannot now say that the trial court erred in its determination as to Ms. Pharr's testimony. We also note that defendant never made any objection at trial during Ms. Pharr's testimony on the basis that it was beyond the scope permitted by Judge Bridges' earlier ruling. As to defendant's arguments on appeal pursuant to the North Carolina Rules of

STATE v. CURRY

[203 N.C. App. 375 (2010)]

Evidence 401-404, these issues have been waived as they were not raised before or argued to the trial court. *See Tellez* at —, 684 S.E.2d at 736. Again, defendant failed to argue plain error, *see* N.C.R. App. P. 10(c)(4), 28(b)(6), and thus this argument is overruled.

C. Agent John Kaiser's Testimony

[6] Defendant next contends that the trial court erred in allowing the testimony of Agent John Kaiser which showed “that defendant was incarcerated in the Gaston County Jail shortly before the shooting and on probation in Gaston County at the time of the shooting and the letters . . . documenting that incarceration—was irrelevant character evidence[.]” During voir dire of Agent Kaiser, defendant’s attorney raised arguments regarding the 5th Amendment and expert opinions. However, on appeal defendant raises arguments regarding North Carolina Rules of Evidence 401-404. Again, we note that defendant has not properly preserved this issue for appeal by his failure to raise it before the trial court. *See Tellez* at —, 684 S.E.2d at 736. However, this time defendant has argued plain error.

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.

Therefore, if after thoroughly examining the record, we are not persuaded that the jury probably would have reached a different result had the alleged error not occurred, we will not award defendant a new trial.

State v. Lofton, 193 N.C. App. 364, 368, 667 S.E.2d 317, 320-21 (2008) (citations and quotation marks omitted). In addition to the substantial evidence presented by the State as to the crimes charged, the fact that defendant was on probation at the time of the incident was also presented by Officer Pharr. *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (“Where evidence is admitted over objection,

STATE v. CURRY

[203 N.C. App. 375 (2010)]

and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.” (citations omitted)). Furthermore, even assuming *arguendo* Agent Kaiser did testify defendant was incarcerated¹ and on probation *and* that the trial court erred in admitting evidence defendant had previously been incarcerated or on probation, we cannot now say that “the jury probably would have reached a different result had the alleged error not occurred[.]” *Lofton* at 368, 667 S.E.2d at 321. This argument is overruled.

D. Jailer Max Davis’ Testimony

[7] Defendant also contends that the trial court erred in allowing Jailer Max Davis to testify that “1) defendant was booked and incarcerated in the Gaston County Jail on October 17, 2006; 2) defendant was an inmate in the Jail for some time; 3) defendant was photographed and completed a visitor list while he was in the Jail.” First, as to testimony that “defendant was booked and incarcerated in the Gaston County Jail on October 17, 2006[.]” we find no such testimony. The relevant portions of the transcript which defendant cites in this argument do not include testimony by Jailer Davis that defendant was booked or incarcerated in October of 2006. The only time 17 October 2006 is mentioned is in regard to a jail visitor list and photograph of defendant. Defendant did not object to the visitor list and only objected to the photograph on the grounds of his “earlier objection[.]” However, defendant had not made an “earlier objection” regarding the 17 October 2006 photograph; he had objected on the prior day of the trial to entirely different photographs of defendant taken in December of 2006. Therefore, defendant has not properly preserved this issue for appeal.

Second, as to testimony that defendant was “an inmate in the Jail for some time[.]” we again do not find such a statement in the cited testimony. There was testimony that defendant was an inmate, but this testimony was not objected to nor does it indicate the length of time defendant was an inmate. Again, this issue has not been properly preserved for appeal.

1. Agent Kaiser did not specifically testify that defendant had been incarcerated in the Gaston County Jail prior to the shooting. In addition, the fact that defendant had been on probation would not necessarily mean that he had been previously incarcerated, as he could have received a suspended sentence and been placed on probation without ever having been incarcerated. Defendant’s argument is apparently based upon the fact that Agent Kaiser identified letters which were addressed to defendant at the Gaston County jail, although the dates of these letters are not in the record before us.

STATE v. CURRY

[203 N.C. App. 375 (2010)]

Third, as to the 17 October 2006 photograph of defendant and the visitor list, as noted above, defendant failed to object to its admission beyond relying upon his “earlier objection,” but the only “earlier objection” related to entirely different photographs taken in December of 2006. Defendant also failed to object to the introduction of the visitor list, State’s exhibit 39.2. Defendant had previously objected to the introduction of a computer screen shot of the visitor list, State’s exhibit 41, and the trial court sustained this objection based upon a lack of foundation. On the next day of trial, when the State presented the actual visitor list, State’s exhibit 39.2, defendant made no objection. This argument has also not been preserved for appeal. Furthermore, defendant failed to argue plain error in his brief, *see* N.C.R. App. P. 10(c)(4), 28(b)(6), and thus this argument is overruled.

E. Officer Wes Love

[8] Defendant next contends that the trial court erred in admitting Officer Wes Love’s “hearsay evidence LaToya McSwain identified defendant’s photograph in a pre-trial photo lineup identification procedure into evidence at trial[.]” As defendant failed to object at trial, we review for plain error. As noted above, even assuming *arguendo* that the trial court erroneously allowed this testimony regarding identification of defendant’s photograph, in light of the State’s evidence we do not conclude “that the jury probably would have reached a different result had the alleged error not occurred, we will not award defendant a new trial[.]” *Lofton* at 368, 667 S.E.2d at 321, particularly in light of the fact that Ms. McSwain also made an in-court identification of defendant as the individual who shot an SK[S] long gun into the house. This argument is overruled.

VI. Insufficient Evidence

[9] Lastly, defendant argues the trial court erroneously denied his motion to dismiss as to his robbery and murder convictions. The jury convicted defendant of murder based on felony murder with the predicate felony being robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87.

The standard of review for a trial court’s denial of a motion to dismiss for insufficient evidence is well-settled:

Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every

STATE v. CURRY

[203 N.C. App. 375 (2010)]

reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.

If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury.

State v. Wilkerson, — N.C. App. —, —, 675 S.E.2d 678, 680 (2009) (citations and quotation marks omitted).

A. Robbery with a Dangerous Weapon

Defendant argues that the "indictment in the robbery case alleged defendant took a 'handgun' and McSwain's 'pocketbook' from the presence, person, and residence of Petty and McSwain" but that "[a]t trial, there was not a scintilla of evidence defendant himself took a handgun and all the evidence showed any such taking was done by Archie." Defendant also argues that the evidence did not show how Ms. McSwain's pocketbook ended up with its "contents 'spilled out' under a[n] old 'door' in the carport of the nearby vacant house[.]" Essentially, defendant argues that there was no direct evidence that he actually took and carried away the pocketbook or gun from the person or presence of Ms. McSwain or Mr. Petty. However, direct evidence of defendant's taking the gun or pocketbook was not required. See *State v. Salters*, 137 N.C. App. 553, 557, 528 S.E.2d 386, 390 ("[J]urors may rely on circumstantial evidence to the same degree as they rely on direct evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Rather, the law requires only that the jury shall be fully satisfied of the truth of the charge." (citations and quotation marks omitted)), *cert. denied*, 352 N.C. 361, 544 S.E.2d 556 (2000). Even if we assume

STATE v. CURRY

[203 N.C. App. 375 (2010)]

arguendo that defendant did not personally remove either the gun or the pocketbook from Mr. Petty's home or carry them away, the State presented substantial evidence that defendant made overt acts in an attempt to rob Mr. Petty by use of a firearm and that lives were endangered; indeed, Mr. Petty's life was lost.

"The elements of robbery with a dangerous weapon are: (1) an unlawful taking *or an attempt* to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." *State v. Cole*, — N.C. App. —, —, 681 S.E.2d 423, 427 (2009) (emphasis added) (citation and quotation marks omitted). The crime of robbery with a dangerous weapon, as defined by N.C. Gen. Stat. § 14-87, includes within the definition of the crime an attempt to commit the crime; that is, the State may present evidence that defendant either completed the crime or that he attempted the crime, but either way the evidence would be sufficient that defendant may be found guilty of robbery with a dangerous weapon. *See* N.C. Gen. Stat. § 14-87 (2005).

Our Supreme Court has described the law regarding an attempt to commit robbery with a dangerous weapon:

The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense. An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result.

In *State v. Price*, 280 N.C. 154, 184 S.E.2d 866 (1971), this Court summarized the requirement of an overt act as follows:

In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as

STATE v. CURRY

[203 N.C. App. 375 (2010)]

the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

State v. Miller, 344 N.C. 658, 667-68, 477 S.E.2d 915, 921 (1996) (citations and quotation marks omitted).

In *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991), the Supreme Court determined “that the trial court erred in denying defendant’s motion to dismiss the charge of attempted robbery with a dangerous weapon,” *id.* at 368, 407 S.E.2d at 203, where the evidence failed to show that the defendant had actually intended to rob anyone and that the victim’s “purse was left undisturbed on the front seat of her car, which tend[ed] to contradict the State’s theory that defendant killed Mrs. Gillie in an unsuccessful attempt to take her purse.” *Id.* at 390, 407 S.E.2d at 215.

However, the facts here are more similar to those in *Miller*, where the court noted evidence that the “defendant clearly intended to rob [the victim] and took substantial overt actions toward that end.” *Miller* at 668, 477 S.E.2d at 922. Even though after shooting the victim, the defendant in *Miller* “became scared and ran away” without taking any property from the victim, the Court noted that “[t]he sneak approach to the victim with the pistol drawn and the first attempt to shoot were each more than enough to constitute an overt act toward armed robbery, not to mention the two fatal shots fired thereafter.” *Id.* at 668-69, 477 S.E.2d at 922 (citation omitted).

Here, there was substantial evidence that defendant and Mr. Archie planned to rob Mr. Petty, obtained a weapon, formulated a plan to rob Mr. Petty, and went to Mr. Petty’s house; defendant entered the house, which was occupied by both Ms. McSwain and Mr. Petty, and began shooting. Although the circumstantial evidence would suggest that defendant did actually take Ms. McSwain’s pocketbook and remove it from the house, the crime of robbery with a dangerous weapon was complete even before any actual removal of the pocketbook. *See* N.C. Gen. Stat. § 14-87.

Defendant also argues that “there was insufficient evidence of taking from Petty’s or McSwain’s person or presence.” However,

[t]he word ‘presence’ . . . must be interpreted broadly and with due consideration to the main element of the crime—intimidation or force by the use or threatened use of firearms. ‘Presence’ here means a possession or control by a person so immediate that force or intimidation is essential to the taking of

STATE v. CURRY

[203 N.C. App. 375 (2010)]

the property. And if the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct, the taking is from the ‘presence’ of the victim.

State v. Tuck, 173 N.C. App. 61, 67, 618 S.E.2d 265, 270 (2005) (citations omitted).

The evidence here showed that both Ms. McSwain and Mr. Petty were present in the home when defendant arrived and began shooting. Ms. McSwain fled the residence, while Mr. Petty was shot and killed. Defendant had gone into the residence with a firearm with the stated intent of robbing Mr. Petty because he needed some money. He used “force or intimidation[,]” *id.*, by shooting into the residence in furtherance of his plan to rob someone for money. As noted above, even if we assume that defendant did not actually remove the pocketbook or gun from the persons of the two victims, the crime of robbery with a dangerous weapon was complete before the removal occurred.

Defendant last argues as to robbery with a dangerous weapon that “there was insufficient evidence the pocketbook was ‘carried away.’” Thus, there was no evidence defendant transported the pocketbook from McSwain’s person or presence to the nearby carport on December 6.” However, as explained above, the crime of robbery with a dangerous weapon was complete upon defendant’s attempt, *see* N.C. Gen. Stat. § 14-87, even if he did not “carry away” the pocketbook or gun from the home, although we note that the circumstantial evidence would certainly support an inference that defendant removed the pocketbook from the residence and dumped it nearby after the shooting. We conclude there was sufficient evidence of robbery with a dangerous weapon for the trial court to deny defendant’s motion to dismiss as the State presented testimony regarding all of the essential elements of the crime of robbery with a dangerous weapon. *See Cole* at —, 681 S.E.2d at 427; *Wilkerson* at —, 675 S.E.2d at 680.

B. Murder

Defendant’s last argument is that

even if there [wa]s sufficient evidence of armed robbery, there is insufficient evidence of first-degree murder because there is

STATE v. CURRY

[203 N.C. App. 375 (2010)]

insufficient evidence of the essential element defendant killed Petty with a deadly weapon. There is simply no evidence defendant was the perpetrator of Petty's shooting. Thus, there was no direct, eyewitness, or forensic evidence defendant shot Petty.

Defendant's argument assumes that "direct, eyewitness, or forensic evidence" is required and overlooks the numerous cases in which our courts have held that circumstantial evidence is adequate to support a conviction of murder. *See, e.g., State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787-88 (1990) ("While we concede that the evidence in this case is primarily circumstantial, we cannot say that the State's evidence is so lacking as to any material element that this Court must conclude, as a matter of law, that no reasonable juror could have found defendant guilty beyond a reasonable doubt."). Circumstantial evidence is frequently adequate to support a murder conviction, depending upon the facts of the individual case and the type of circumstantial evidence presented. *See, e.g., id.*

When the evidence is circumstantial, the trial court's function is to test whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. *See also State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965) ("[I]t is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty."). The Court views the evidence in the light most favorable to the State.

State v. Lowry, — N.C. App. —, —, 679 S.E.2d 865, 870 (citations, quotation marks, and brackets omitted), *cert. denied*, 363 N.C. 660, 686 S.E.2d 899 (2009). Circumstantial evidence of guilt is sometimes classified into

several rather broad categories. Although the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime.

Id. at —, 679 S.E.2d 870-71. The court examined several cases involving circumstantial evidence and concluded that where the State has presented evidence of "both motive and opportunity[.]" the evidence will normally be sufficient to survive a motion to dismiss. *Id.* at , 679 S.E.2d at 873.

STATE v. CURRY

[203 N.C. App. 375 (2010)]

Here, the evidence “viewed in the light most favorable to the State,” *Wilkerson* at —, 675 S.E.2d at 680, shows that defendant had the motive, the opportunity, and the capability to kill Mr. Petty. Defendant entered Mr. Petty’s home, shooting repeatedly, seeking Mr. Petty in an attempt to rob him, and immediately after defendant fired the weapon, Mr. Archie found Mr. Petty, dead or dying from gunshot wounds. The State presented very substantial evidence of defendant’s motive to rob Mr. Petty, the actual robbery, defendant’s opportunity to kill Mr. Petty, and defendant’s capability to kill Mr. Petty by shooting him with the weapon defendant procured for the very purpose of robbing Mr. Petty. It is entirely unnecessary that the State present eyewitness testimony that defendant shot Mr. Petty, as suggested by defendant’s argument. *See, e.g., Franklin*, at 170-74, 393 S.E.2d at 786-89. The trial court did not err in denying defendant’s motion to dismiss for insufficiency of the evidence. This argument is overruled.

VII. Conclusion

For the foregoing reasons, we arrest judgment on defendant’s conviction for robbery with a dangerous weapon, remand defendant’s judgment for discharging a weapon into occupied property for correction of a clerical error, and find no prejudicial error as to defendant’s other arguments.

JUDGMENT ARRESTED, REMANDED FOR CORRECTION OF CLERICAL ERROR, NO PREJUDICIAL ERROR.

Judge STEPHENS concurs.

Judge BEASLEY concurs with separate opinion.

BEASLEY, Judge concurring in a separate opinion.

While I concur with the result in the majority opinion, I am compelled to write separately on the issues below.

Defendant did not preserve his objection to Mr. Archie’s testimony and requested that we review his argument applying the plain error standard. However, Defendant did not specifically argue this. I agree with the majority that N.C. R. App. P. 28 (b)(6) dictates our actions on this issue and that Defendant’s argument is deemed abandoned. As any further analysis of Defendant’s contentions is unnecessary, my analysis on this issue would cease here.

STATE v. CURRY

[203 N.C. App. 375 (2010)]

It is worth noting however, that the Defendant argues that the trial court committed prejudicial error by admitting Mr. Archie's testimony about Mr. Archie and Defendant's relationship as noted by the dialogue set forth in the majority opinion.

Q. Okay. While you and Martavious Curry were becoming friends, what type of activities did you all participate in? And I'm talking about such as playing cards, going to the movies, generally, what types of things did you all do together to become friends?

A. We just hung out. You know what I'm saying? Just hang out, sell drugs.

MR. ANTHONY: Objection.

THE COURT: Overruled

The majority opinion correctly states this series of questioning. However, it was not the question to which Defendant objected, but the answer. As it was unlikely that Defendant's counsel anticipated that Mr. Archie would testify that he and Defendant sold drugs, the only logical opportunity for Defendant's counsel to object was *after* the witness had answered the question. *See State v. Goss*, 293 N.C. 147, 155, 235 S.E.2d 844, 850 (1977) ("Where inadmissibility of testimony is not indicated by the question, but appears only in the witness' response, the proper form of objection is a motion to strike the answer, or the objectionable part of it, made as soon as the inadmissibility is evident").

However, I agree with the majority that pursuant to well-grounded law in North Carolina, Defendant waived this issue. Defendant's counsel asked the trial court to repeat its ruling, whereby the prosecutor again asked Mr. Archie about the manner by which he and Defendant established a relationship, Mr. Archie essentially repeated his answer that he and the Defendant "hung out and sell drugs" and the trial court repeated its ruling, overruling Defendant's objection. Defendant's counsel did not move to strike, nor renew his objection, therefore this issue was not preserved for our review. *Id.*; *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). Further, any error that may have resulted from the unfavorable testimony provided by Mr. Archie was harmless.

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

STATE OF NORTH CAROLINA v. MERVIN VERRON ARMSTRONG

(No. COA09-1276)

(Filed 20 April 2010)

1. Constitutional Law— double jeopardy—second-degree murder and DWI—evidence of malice

Defendant's conviction and sentencing for DWI and second-degree murder did not violate double jeopardy principles, applying *State v. McAllister*, 138 N.C. App. 252. There was evidence that defendant drove while impaired and while his license was revoked after prior convictions for driving while impaired, so that there was evidence of malice other than the impaired driving in this case. Although defendant argued that the DWI was an element of second-degree murder in this case, the trial judge correctly instructed the jury that they could not find defendant guilty of second-degree murder without also finding malice.

2. Criminal Law— driving while license revoked—instruction

There was no prejudicial error where the trial court erroneously instructed the jury that the State had proved defendant's knowledge of suspension of his driver's license, but immediately afterward correctly instructed the jury that it must return a verdict of not guilty if the State had not proved notice beyond a reasonable doubt. Viewing the instruction as a whole, the *lapsus linguae* did not implicitly direct a verdict of guilty against defendant.

3. Appeal and Error— preservation of issues—insufficient evidence—no motion to dismiss at trial

Defendant did not preserve for appeal an argument that there was insufficient evidence of the knowledge requirement in a prosecution for driving with a revoked license where defendant did not move at trial for a dismissal of the charge.

4. Sentencing— prior record points—out-of-state convictions

The trial court did not erroneously assign prior record points to out-of-state convictions where defendant had three driving under the influence convictions in Alabama. The trial court concluded that the Alabama offenses were substantially similar to the DWI provisions in the North Carolina statutes.

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

5. Evidence— expert testimony—no notice in discovery—no prejudice

The trial court erred by allowing a witness to give expert testimony on the ingredients and effect of Narcan in a prosecution for second-degree murder and DWI. Based on testimony regarding the witness's qualifications and on the substance of his opinion, the witness provided expert testimony even though the State did not properly notify defendant during discovery that it intended to offer the witness as an expert. However, the error was harmless in light of the fact that the State presented sufficient evidence of malice beyond defendant's high blood-alcohol level and in light of the fact that the evidence was cumulative.

6. Appeal and Error— independent juror investigation—constitutional theory not raised below—not preserved for appeal

The trial court did not err by denying defendant's motion for appropriate relief where a juror came forward after the trial to indicate that another juror had investigated evidence on the Internet. Although defendant contended that he was denied his constitutional right to a jury of twelve and that this was reversible error *per se*, he did not raise the issue at trial or preserve it for appellate review.

7. Constitutional Law— right to confront witnesses—independent juror investigation—standard

The trial court applied the correct standard to an alleged violation of the right to confront witnesses by placing the burden on the State to rebut the presumption of prejudice and then determining whether the evidence was harmless beyond a reasonable doubt.

8. Criminal Law— juror misconduct—independent investigation—harmless error

The trial court did not err in a prosecution for driving while impaired and for second-degree murder by concluding that juror misconduct was harmless beyond a reasonable doubt in light of the evidence presented by the State's witnesses. There is no reasonable possibility that extraneous information could have had an effect on the average juror.

Appeal by Defendant from judgments entered 9 December 2008 and order entered 19 February 2009 by Judge David S. Cayer in

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

Superior Court, Mecklenburg County. Heard in the Court of Appeals
8 March 2010.

*Attorney General Roy Cooper, by Assistant Attorney General
Jess D. Mekeel, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate
Defender Daniel R. Pollitt, for defendant-appellant.*

WYNN, Judge.

Defendant Mervin Verron Armstrong appeals from his convictions on the charges of second-degree murder, driving while impaired (“DWI”), and driving while license revoked (“DWLR”) arising out of an automobile crash in which his passenger was killed. Upon review, we uphold Defendant’s convictions.

At 6:50 p.m. on 28 February 2007, Robert Litzinger, Sr., a refrigeration service technician, drove a company panel truck southbound on South Tryon Street in Charlotte, North Carolina. Shortly after Litzinger observed a black Toyota Corolla driven by Defendant approach from General Drive, a side street to the left, Litzinger’s truck collided with the right side of Defendant’s car in a T-Bone collision.

Todd Howard Passoms saw the collision as he drove southbound on South Tryon Street approximately 100 feet behind Litzinger. Passoms stated that Defendant’s vehicle approached from a side street; did not stop at the stop sign at the intersection with South Tryon Street; traveled across both northbound lanes; failed to stop or pause in the median before entering the southbound lanes; and traveled directly into Litzinger’s path. Passoms stated that he could not tell whether Litzinger applied his brakes, but noted there was no way that Litzinger would have had time.

The collision caused Litzinger’s truck to flip onto the driver’s side and come to rest in the far right lane of the street. Passoms pulled over, ran to Defendant’s vehicle, and observed extensive damage to the car. The passenger in the front seat, Terrence Antonio Pretty, sat motionless and had no discernable pulse. It was later determined that Pretty had died from accident-related blunt trauma injuries. Passoms then checked on Defendant, who was unconscious in the driver’s seat. Passoms smelled a mild odor of alcohol in the front compartment of the vehicle. Passoms then called 911.

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

Paramedics John Marlow and Randall Burch responded to the scene at approximately 7:10 p.m. Marlow verified that Pretty was deceased. Charlotte Fire Department crew members extracted Defendant from the Toyota and Paramedics put him in an ambulance. Burch and Marlow stated that they smelled alcohol on Defendant's breath. Defendant exhibited no injuries other than a laceration on his face and scratches on his arms but he was unresponsive. Defendant was placed on IVs, and paramedics administered saline to elevate his blood pressure. Paramedics also administered Narcan, an anti-opiate, because Defendant was unresponsive and exhibited signs of trauma, and because his pupils were pin points—another sign of opiate overdose.

Neither Marlow nor Burch knew the precise chemical composition of Narcan, but both stated that Defendant was not given any alcohol. Burch testified that Narcan does not contain any alcohol. Jennifer Mills, a forensic chemist of thirty years, testified as an expert for the State. She stated on cross-examination that she did not know of any medicines that could have increased Defendant's blood-alcohol level.

Officer Steven Ashley Williams of the Charlotte-Mecklenburg Police Department arrived on the scene at approximately 7:15 p.m. Inside Defendant's car, Officer Williams discovered opened and unopened beer cans and an opened pint of gin. While investigating the scene, Officer Williams noted that Litzinger's truck had left skid marks, and that there was a stop sign on General Drive at the intersection with South Tryon Street.

Matthew Pressley, an officer and certified chemical analyst with the Charlotte-Mecklenburg Police Department, arrived at the hospital at approximately 8:15 p.m. and spoke with Defendant. Defendant acknowledged being in a collision but denied driving. Officer Pressley observed that Defendant had slurred speech, a strong odor of alcohol on his breath, and glassy bloodshot eyes. Officer Pressley charged Defendant with DWI and DWLR.

At 8:39 p.m., Officer Pressley requested that Defendant submit to a blood draw. Defendant consented but refused to sign the rights form and declined to call any witnesses. Officer Pressley requested that Jamie Thomason, a hospital nurse, draw Defendant's blood for alcohol testing. The sample indicated a blood-alcohol concentration of 0.24. Thomason had previously drawn Defendant's blood for medical purposes at 7:45 p.m. That sample indicated a blood-alcohol con-

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

centration of 0.26. Defendant was not given anything containing alcohol during treatment before his blood was drawn.

Officer Jesse Wood testified at trial that DMV records showed that Defendant's license had been indefinitely suspended as of December 2005 and that Alabama court records indicated that Defendant had been convicted of driving under the influence of alcohol in 1994, 1998, and 1999.

Defendant recalled Officer Williams as an accident reconstruction expert. Officer Williams testified that in March of 2007, he estimated Litzinger's pre-impact speed at fifty-five miles per hour.

Paul Glover, a research scientist and the head of the Forensic Test for Alcohol Branch of the North Carolina Department of Health and Human Services, testified for the State that Narcan neither contains alcohol nor affects blood-alcohol level.

On 2 July 2007, Defendant was indicted for second-degree murder, felony death by motor vehicle, assault with a deadly weapon inflicting serious injury, transportation of an open container of an alcoholic beverage after consuming alcohol, DWI, and DWLR. Defendant was tried at the 1 December 2008 Criminal Session of Superior Court in Mecklenburg County. At the close of all evidence, the State dismissed the felony death by motor vehicle and open container charges. The jury found Defendant guilty of second-degree murder, DWI, and DWLR. The trial court consolidated the murder and DWLR convictions for judgment and sentenced Defendant as a prior record level II offender.

A few days after judgment was entered against Defendant, Juror Lisa Breidenbach came forward with evidence of juror misconduct. An evidentiary hearing was held 15 December 2008. Juror Breidenbach testified that during deliberations another juror stated that she had looked up Narcan on the internet and learned that it had no effect on the body as to alcohol content. In light of this testimony, Defendant filed a motion for appropriate relief ("MAR") on 17 December 2008.

The trial court issued an order in which it found as a fact that Juror Sarah Bumgarner did commit the alleged misconduct. The trial court found that the misconduct violated Defendant's constitutional rights. However the trial court denied the MAR on the ground that the constitutional violation was harmless beyond a reasonable doubt.

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

On appeal, Defendant raises six arguments in which he contends the trial court: (I) violated double jeopardy principles when it entered judgment on both the murder and the DWI convictions; (II) erred in its instructions on proof of knowledge in the DWLR charge; (III) erred in allowing the DWLR case to go to the jury because there was insufficient evidence of the knowledge element; (IV) erred in assigning prior record points to Defendant's three out-of-state convictions; (V) erred in admitting the expert opinion testimony of Paul Glover; and (VI) erred in denying Defendant's motion for appropriate relief.

I

[1] Defendant first argues that his DWI conviction must be vacated because entry of judgments in that case and in the second-degree murder case violates double jeopardy principles and the Fifth Amendment to the United States Constitution.

At trial, the trial court submitted the DWI case to the jury, instructing the jury on the three requisite elements. The trial court then submitted the second-degree murder case to the jury using pattern jury instruction 206.32, which has as its fourth element that the defendant violated a state law governing the operation of motor vehicles. *See* N.C.P.I. 206.32 (2001). The law against DWI was the only motor vehicle law submitted as the fourth element of the murder charge. The jury found Defendant guilty of DWI and second-degree murder.

Defendant argues that because all of the elements of DWI were included within the elements of second-degree murder, the DWI merged into the murder. Defendant concludes from this that entry of judgment on both offenses violates double jeopardy principles.

"The double jeopardy clause prohibits (1) a second prosecution for the same offenses after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense." *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003). Defendant argues that he was subject to multiple convictions for the same offense, citing *State v. Lopez*, 363 N.C. 535, 536, 681 S.E.2d 271, 272 (2009) (explaining the merger of offenses where defendant is convicted of both a greater and a lesser-included offense). We have recognized, however, that "double jeopardy does not prohibit multiple punishment for two offenses—even if one is included within the other under . . . if both are tried at the same time and the legislature intended for both offenses to be separately punished." *Ezell*, 159 N.C. App. at 107, 582 S.E.2d at 682.

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

We confronted an argument similar to Defendant's in *State v. McAllister*, 138 N.C. App. 252, 530 S.E.2d 859, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000). Defendant in *McAllister* was convicted of DWI and second-degree murder. *Id.* at 255, 530 S.E.2d at 861. On appeal, he argued "that his Fifth Amendment right to protection from Double Jeopardy was violated when he was punished twice for impaired driving because each element of that offense was necessary to prove the second degree murder offense and he was sentenced for both offenses." *Id.* at 255, 530 S.E.2d at 862. This Court specifically rejected that argument, stating "[w]e disagree and believe that the legislature intended to create two separate offenses. We note that punishment for second degree murder is controlled by structured sentencing while punishment for driving while impaired is exempted from the structured sentencing provisions." *Id.* at 256, 530 S.E.2d at 862.

Defendant attempts to distinguish *McAllister* by contending that in that case, the defendant argued that the DWI was the basis for the malice element of second-degree murder, whereas Defendant here argues that under the particular jury instructions given, DWI was the fourth element of second-degree murder. Strictly speaking, DWI is not an element of second-degree murder at all, the jury instructions in this case notwithstanding. *See* N.C. Gen. Stat. § 14-17 (2009); *McAllister*, 138 N.C. App. at 256, 530 S.E.2d at 862. Moreover, the trial judge correctly instructed the jury that they could not find Defendant guilty of second-degree murder without also finding malice. Thus, Defendant's attempt to distinguish *McAllister* on this basis is unavailing.

Defendant argues further that in *McAllister* there was other evidence of malice in addition to the DWI. We have elsewhere recognized that sufficient evidence of malice existed in a second-degree murder prosecution where a defendant drove while impaired after prior convictions for driving while impaired, and the defendant drove while his license was revoked. *State v. McBride*, 109 N.C. App. 64, 68, 425 S.E.2d 731, 734 (1993). Evidence of both of these factors was presented in this case. Consequently, "there was evidence to support a finding of malice in the present case other than the fact that defendant was driving while impaired[.]" *McAllister*, 138 N.C. App. at 257, 530 S.E.2d at 863.

Applying *McAllister*, we hold that Defendant's conviction and sentencing for DWI and second-degree murder did not violate double jeopardy principles.

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

II

[2] Defendant next argues that he is entitled to a new trial in the DWLR case because the trial court's jury instruction on proof of knowledge was erroneous in law and unconstitutionally peremptory.

Defendant was charged with driving while his driver's license was revoked under N.C. Gen. Stat. § 20-28(a) and pled not guilty. During the charge conference, the trial court indicated it would use the pattern instruction on DWLR.

Pattern Jury Instruction 271.10 states:

Proof beyond a reasonable doubt that the State complied with the three requirements of the notice provisions permits, but does not compel you to find that defendant received the notice and thereby acquired knowledge of the suspension. The State must prove the essential elements of the charge, including the defendant's knowledge of the suspension, from the evidence beyond a reasonable doubt.

N.C.P.I. 271.10 (2001). In the present case, after agreeing to give the above instruction, the trial court instead charged the jury as follows:

Proof beyond a reasonable doubt occurs with [sic] the State has complied with the three requirements of the notice provision which does tell you that the Defendant received notice and thereby acquired the knowledge of the suspension. Therefore, the State has proved the essential elements of the charge, including the Defendant's knowledge of the suspension, from the evidence beyond a reasonable doubt.

Defendant argues that the instruction given was an incorrect statement of the law, and that it unconstitutionally directed a verdict of guilty against defendant. Immediately following the contested instruction, the trial court continued,

So, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant drove a motor vehicle on the highway while his driver's license was suspended, and that the Defendant knew on that date that his license was suspended because at least four days before the alleged offense, the Department of Motor Vehicles had deposited a notice of the suspension in the United States mail, in an envelope with postage pre-paid, and addressed to the Defendant at his address as shown by the records of the Department of Motor Vehicles, it would be your

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

duty to return a verdict of guilty. If you do not so find, or if you have a reasonable doubt about one or more of these things, it would be your duty to return a verdict of not guilty.

This section of the jury instruction tracks the language of the pattern jury instruction for DWLR. *See* N.C.P.I. 271.10 (2001).

“The rule is that the trial court in charging a jury may not give an instruction which assumes as true the existence or nonexistence of any material fact in issue.” *State v. Cuthrell*, 235 N.C. 173, 174, 69 S.E.2d 233, 234 (1952). “When a judge undertakes to define the law he must state it correctly, and if he does not, it is prejudicial error sufficient to warrant a new trial.” *State v. Stroupe*, 238 N.C. 34, 40, 76 S.E.2d 313, 318 (1953). “This Court has uniformly held that where the court charges correctly in one part of the charge, and incorrectly in another part, it will cause a new trial, since the jury may have acted upon the incorrect part of the charge.” *Id.* at 40-41, 76 S.E.2d at 318; *see also State v. Castaneda*, — N.C. App. —, —, 674 S.E.2d 707, 713 (2009) (holding that there was prejudicial error where trial court twice identified defendant as an accomplice to the crime, which was “the only issue in dispute at trial”).

On the other hand, our Supreme Court has recognized situations in which an erroneous instruction does not warrant reversal. “Where the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous.” *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004), *cert. denied*, *Morgan v. North Carolina*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). “This Court has repeatedly held that a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction.” *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994) (holding there was no prejudicial error where the trial court once instructed the jury to find the defendant guilty if they had reasonable doubt); *see also State v. Collins*, 22 N.C. App. 590, 596, 207 S.E.2d 278, 282, *cert. denied*, 285 N.C. 760, 209 S.E.2d 284 (1974) (holding there was no prejudicial error where the trial court instructed the jury that defendant was presumed guilty).

In the present case, the trial court erroneously instructed the jury that the State had proved Defendant’s knowledge of the suspension. But the trial court immediately afterward correctly instructed the

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

jury that if the State had not proved beyond a reasonable doubt that Defendant had received notice of the suspension, it would be the duty of the jury to render a verdict of not guilty. Moreover, the trial court stated at the beginning of the entire instruction that “[t]he State must prove to you that the Defendant is guilty beyond a reasonable doubt.” At the end of the instruction, the trial court charged, “[i]t is your exclusive province to find the true facts of the case and to render a verdict reflecting the truth as you find it.”

This situation is analogous to *Baker* and *Collins* where “the trial court repeatedly instructed the jury that the State had the burden of proving defendant was guilty beyond a reasonable doubt.” *Baker*, 338 N.C. at 565, 451 S.E.2d at 597. Contrary to Defendant’s assertions, the trial court did not explicitly direct a verdict of guilty against Defendant, and—in view of the instruction taken as a whole—we cannot conclude that the lapsus linguae did so implicitly. Accordingly, we hold that “[r]eading the charge in its entirety, we are convinced the jurors could not have been misled” *Id.* Defendant has consequently failed to demonstrate prejudicial error regarding the jury instruction.

III

[3] Defendant next argues that his DWLR conviction must be vacated because there was insufficient evidence of the knowledge requirement.

At the close of the State’s evidence, Defendant moved to dismiss the second-degree murder and assault with a deadly weapon charges. At the close of all the evidence, Defendant renewed his motion to dismiss the charge of assault with a deadly weapon. Defendant at trial never moved to dismiss the charge of DWLR.

Our Rules of Appellate Procedure specify how a defendant preserves the alleged error of insufficient evidence.

(3) *Sufficiency of the Evidence.* In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial.

N.C. R. App. P. 10(a)(3) (2010). Defendant did not move at trial for a dismissal of the DWLR. Defendant has therefore failed to preserve this issue for appellate review.

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

IV

[4] Defendant next argues that he is entitled to a new sentencing hearing in the murder case because the trial court erroneously assigned prior record points to Defendant's three out-of-state convictions and sentenced him as a prior record level II offender. Defendant contends that the assignment of points was error because (1) the Alabama offenses are not substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina; and (2) the State failed to prove the Alabama offenses are classified as misdemeanors in Alabama.

During the trial and sentencing hearing the State submitted evidence tending to show that Defendant had three prior convictions for driving under the influence of alcohol in Alabama, violations of Ala. Code § 32-5A-191, in the 1990s. The State submitted to the trial court for consideration the text of the relevant Alabama statute.¹ No evidence offered at trial shows that Alabama classifies violations of Ala. Code § 32-5A-191 as misdemeanors. The only prior convictions Defendant had were the three prior Alabama convictions.

At the end of the sentencing hearing in the murder case, the trial court concluded that the Alabama offenses were substantially similar to the DWI provisions of the North Carolina statutes. The trial court treated the offenses as Class A1 or Class 1 misdemeanors and assigned one prior record point to each of the three Alabama convictions. The trial court thus found a total of three prior record level points and concluded that Defendant was a prior record level II offender for sentencing purposes.

Our Structured Sentencing statute provides:

If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2009). The same statute specifies that "[e]xcept as otherwise provided in this subsection, a conviction

1. State's Exhibit No. 39 includes certified copies of Ala. Code § 32-5A-191 (Supp. 1984), Ala. Code § 32-5A-191 (Supp. 1994), and Ala. Code § 32-5A-191 (Supp. 1998). State's Exhibit No. 40 includes a certified copy of the current statute, Ala. Code § 32-5A-191 (1999).

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

occurring in a jurisdiction other than North Carolina . . . is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor.” *Id.* Under the statute, a conviction classified as a Class 3 misdemeanor would not receive any prior record level points. N.C. Gen. Stat. § 15A-1340.14(b)(5) (2009).

Defendant argues that the Alabama offenses were not “substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina.” N.C. Gen. Stat. § 15A-1340.14(e) (2009). Defendant contends that DWI in North Carolina is not classified as a Class A1 or Class 1 misdemeanor. It follows that Defendant’s prior convictions in Alabama could not be analogized to DWI convictions in North Carolina which would justify the assignment of one prior record level point each under N.C. Gen. Stat. § 15A-1340.14 (b)(5).

Defendant overlooks the fact that this Court determined in *State v. Gregory*, 154 N.C. App. 718, 722, 572 S.E.2d 838, 841 (2002), “that a DWI conviction is a Class 1 misdemeanor.” It is true that the *Gregory* Court made this determination for the purposes of interpreting a rule of North Carolina evidence, but we find the reasoning equally applicable here. The Court in *Gregory* began by observing that DWI is a misdemeanor under N.C. Gen. Stat. § 20-138.1(d) (the DWI statute). *Id.* “If the offense is a misdemeanor for which there is no classification, it is as classified in G.S. 14-3.” N.C. Gen. Stat. § 15A-1340.23(a) (2009). “Any misdemeanor that has a specific punishment, but is not assigned a classification” is classified as a Class 1 misdemeanor “[i]f that maximum punishment is more than six months imprisonment.” N.C. Gen. Stat. § 14-3(a) (2009). “The maximum punishment permitted by statute for misdemeanor DWI is imprisonment for ‘a minimum term of not less than 30 days and a maximum term of not more than 24 months.’” *Gregory*, 154 N.C. App. at 722, 572 S.E.2d at 841 (quoting N.C. Gen. Stat. § 20-179(g) (2001)). Therefore, DWI is a Class 1 misdemeanor and Defendant’s argument to the contrary must fail.

Defendant argues further that the State did not produce any evidence that the DWI offenses were classified as misdemeanors in Alabama. The State observes that the Alabama statutes offered to the trial court in State’s exhibit No. 39 all provided that a first conviction of driving while under the influence could result in imprisonment for up to one year. *See* Ala. Code § 32-5A-191 (Supp. 1984); Ala. Code § 32-5A-191 (Supp. 1994); Ala. Code § 32-5A-191 (Supp. 1998). Following the reasoning from *Gregory*, because the Alabama convictions could have resulted in imprisonment for more than six months,

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

those convictions were properly classified as misdemeanors. *See* N.C. Gen. Stat. § 14-3(a)(1) (1999). Indeed, Alabama does classify DWIs as misdemeanors. *See* Ala. Code § 13A-1-2(9) (1999) (defining “misdemeanor” as “[a]n offense for which a sentence to a term of imprisonment not in excess of one year may be imposed”). Thus, Defendant’s Alabama convictions were properly classified as misdemeanors.

Accordingly, there is no merit to Defendant’s argument that the trial court erroneously assigned prior record points to Defendant’s out-of-state convictions.

V

[5] Defendant next argues that he is entitled to a new trial because the trial court erroneously admitted Paul Glover’s testimony. Defendant asserts that the error was prejudicial because Glover’s evidence was crucial to the jury’s finding of malice in the second-degree murder conviction.

Before trial, the State provided discovery to Defendant which did not list Glover as either a lay or expert witness. On direct examination during the State’s case, two paramedics and a nurse testified that they did not administer any alcohol to Defendant but that Defendant was given Narcan on the way to the hospital. On cross-examination, these witnesses admitted they did not know the chemical composition of Narcan or what all of the side effects of the drug might be.

Near the end of the State’s case and acknowledging that there had been no discovery regarding Glover, the State moved to call Glover as an expert witness on alcohol physiology and pharmacology. Glover had no prior connection to Defendant’s case but was found by prosecutors in the courthouse while he was testifying in a different case. The trial court sustained Defendant’s objection, and Glover was not allowed to testify as an expert as part of the State’s case-in-chief.

Once the State rested, Defendant presented his case-in-chief. This consisted of recalling State’s witness Officer Steven Williams to provide evidence regarding accident reconstruction. On rebuttal, the State again moved to call Paul Glover, this time as a lay witness, to testify that Narcan contains no alcohol and has no effect on blood-alcohol level. Defendant objected, alleging that the State was attempting to offer expert opinion without saying Glover was an expert.

The trial court held a voir dire of Glover. Glover testified that he was the branch head and a research scientist for the Forensic Test for

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

Alcohol, a branch of the North Carolina Department of Health and Human Services. He indicated that he was neither a doctor nor a pharmacologist, but that in each case in which he had been called to testify, he testified as an expert. When asked about Narcan, Glover replied that “I have been able to read what the PDR [Physician’s Desk Reference] says about it.” He clarified that even before this review, he did know how Narcan is used and what it does and that it has no effect on alcohol. “I am qualified,” he said, “as an expert on the effects of . . . drugs in DWI cases.”

At the end of the voir dire, Defendant objected to the testimony, on the grounds that Glover’s opinion was “based on no greater knowledge than any other witness” since he had merely reviewed the PDR. When the State observed that other witnesses had already testified to the ingredients of Narcan, Defendant argued that “this witness is thus cumulative.” The trial court overruled Defendant’s objection and allowed Glover to testify as a lay witness to the effect of Narcan on blood-alcohol level.

Defendant now argues that the trial court erred in allowing Glover to testify because Glover’s evidence was (1) expert opinion masquerading as lay testimony; (2) inadmissible because he was not qualified in the area of his testimony; and (3) inadmissible because his proffered method of proof was not sufficiently reliable.

Defendant relies on *State v. Blankenship*, 178 N.C. App. 351, 631 S.E.2d 208 (2006), for the proposition that expert opinion masquerading as lay testimony is not admissible. This somewhat overstates our holding in *Blankenship*. In that case, the State sought to call a witness as an expert without having complied with the notice requirements of N.C. Gen. Stat. § 15A-903(a)(2). *Id.* at 355, 631 S.E.2d at 211. “The trial court stated that since Agent Razzo would not be giving his opinion as to the specific facts of defendant’s case, and he had not performed any tests or examinations on any of the evidence in the case, he would be permitted to testify as a fact witness.” *Id.* Upon calling the witness to the stand, the State attempted to tender the witness as an expert. *Id.* The trial court refused to accept the witness as an expert but permitted the witness to testify, over defendant’s objection, “concerning the manufacturing process of methamphetamine.” *Id.*

On appeal, defendant argued that the trial court erred when it allowed Agent Razzo to testify and found that the State had not violated discovery procedures. *Id.* at 353, 631 S.E.2d at 210. This Court

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

agreed that the witness was testifying as an expert and that the trial court abused its discretion in allowing him to testify as such since “defendant was not provided sufficient notice that the State would be presenting any expert witnesses.” *Id.* at 356, 631 S.E.2d at 212. The issue in *Blankenship* was thus whether the trial court erred in permitting the witness to testify at all without the State having complied with discovery requirements. *Id.* *Blankenship* did not establish a new rule of evidence to prohibit categorically all expert opinion disguised as lay testimony, as Defendant suggests.

Although Defendant somewhat misstates the import of *Blankenship*, we cannot ignore its obvious similarity to the facts before us. As in *Blankenship*, the State here sought to introduce expert testimony without having complied with the discovery requirements of N.C. Gen. Stat. § 15A-903(a)(2). As in *Blankenship*, the trial court refused to allow the State to tender the witness as an expert, but allowed the same person to testify as a lay witness. Finally, as in *Blankenship*, Defendant argues on appeal that the trial court erred in allowing the witness to testify. To determine whether the trial court erred as in *Blankenship*, we must determine whether Glover in fact testified as an expert.

“If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2009). “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.” N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009).

Blankenship explained its determination of the witness’s status as an expert thus:

Although the trial court permitted Agent Razzo to testify as a so-called lay witness, we hold that he in fact qualified as, and testified as, an expert witness. The jury was permitted to hear testimony about his extensive training and experience in the process of manufacturing methamphetamine and clandestine laboratory investigations, along with his specialized knowledge of the manufacturing process of methamphetamine. Also, the State specifically tendered Agent Razzo as an expert witness, and the trial

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

court failed to take any action to remedy the State's attempt to tender Agent Razzo as an expert. We hold that based on the presentation of evidence concerning Agent Razzo's extensive training and experience, he was "better qualified than the jury as to the subject at hand," and he testified as an expert witness.

Id. at 356, 631 S.E.2d at 211 (quoting *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993)).

The Court in *Blankenship* thus considered (1) that the witness testified to his qualifications and (2) that the State attempted to tender him as an expert. A witness's qualifications alone do not make the witness an expert witness. *See Turner v. Duke University*, 325 N.C. 152, 167-68, 381 S.E.2d 706, 715-16 (1989). Nor does the fact that a witness is better qualified than the jury to render an opinion. "A witness who is better qualified than the jury to form a particular opinion may satisfy the Rule, but the Rule does not explicitly provide that it is satisfied *only* by such a witness. The Rule should not be interpreted to require such a witness." 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 184 (4th ed. 1993).

At the same time, the touchstone of expert testimony is not that the proponent of the evidence sought to tender an expert. Rather, our Courts have recognized that a witness may be accepted as an expert by implication. *See State v. Wise*, 326 N.C. 421, 431, 390 S.E.2d 142, 148 (holding that a witness was an expert who testified based on her training and experience to characteristics of abused children), *cert denied*, *Wise v. North Carolina*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990). In *Wise*, our Supreme Court explained that "the trial court's overruling of defense counsel's objection to the opinion testimony constituted an implicit finding that the witness was an expert." *Id.* at 430, 390 S.E.2d at 148. Stated differently, "a finding that the witness is qualified as an expert is implicit in the trial court's ruling admitting the opinion testimony." *Id.* at 431, 390 S.E.2d at 148.

In the present case, the State called Paul Glover to the stand and elicited extensive testimony concerning his training and experience.² Glover then testified, over Defendant's objection, that Narcan contains no alcohol, and that it has no effect on blood-alcohol content. Based on the testimony regarding Glover's qualifications and on the

2. Glover's qualifications, including his current occupation as branch head and research scientist at Forensic Test for Alcohol and his educational background, cover nearly two pages of the transcript.

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

substance of his opinion admitted over objection, we hold that Glover provided expert testimony. Because the State did not properly notify Defendant during discovery that it intended to offer Glover as an expert, the trial court erred in allowing him to testify as such. *See Blankenship*, 178 N.C. App. at 356, 631 S.E.2d at 212. We must now determine whether Defendant was prejudiced by the error.

Defendant argues that “the critical factor establishing second-degree murder implied malice was the extremely high blood-alcohol level of defendant’s blood when it was drawn in the hospital.” Defendant does not argue that the State presented insufficient evidence of DWI. Rather, Defendant suggests that the jury’s finding of malice turns on his “extremely high” blood-alcohol level. Because Defendant’s blood-alcohol level may have been affected by Narcan, it follows—according to Defendant—that the State did not establish that his high blood-alcohol level was the result of voluntary intoxication.

We explained above (in section I), however, that DWI is not a substitute for the malice element of second-degree murder. As in *McAllister*, there was sufficient evidence of malice in this case beyond the evidence of Defendant’s subsequent impairment. Glover’s testimony, if it had any effect at all, merely rebutted Defendant’s assertion of Narcan’s effects, an assertion which Defendant offered no affirmative evidence to support. Consequently, Defendant fails to persuade that Glover’s opinion was crucial to the jury’s finding of malice.

Furthermore, there is sufficient other evidence to support the State’s assertion that Glover’s testimony was merely corroborative. State’s witness Marlow testified that he did not put any alcohol into Defendant and that Narcan has very few side effects. State’s witness Burch testified that Narcan does not contain any alcohol. State’s witness Thomason testified that Defendant was not given anything containing alcohol during treatment before his blood was drawn. Finally, State’s witness Mills, a forensic chemist of thirty years who testified as an expert, stated that she did not know of any medicines that could have increased Defendant’s blood-alcohol level. Glover then testified that there is no alcohol in Narcan and that it has no effect on blood-alcohol level.

In sum, we hold that the trial court erred in allowing Glover, over objection, to provide expert testimony on the ingredients and effect of Narcan. However, we hold that this error was harmless in light of

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

the fact that the State presented sufficient evidence of malice beyond Defendant's high blood-alcohol level and in light of the fact that Glover's evidence was, as Defendant's trial counsel recognized, cumulative of evidence that had already been admitted.

VI

[6] Defendant next argues that the trial court erred in denying his motion for appropriate relief on the ground that the unconstitutional jury misconduct was harmless beyond a reasonable doubt.

After the trial ended and the verdict was received, Juror Lisa Breidenbach contacted the bailiff regarding juror misconduct. Breidenbach indicated that she was concerned that some of the jurors had received some information that was not part of the trial. The trial court held a hearing on 15 December 2008.

Breidenbach testified at the hearing that another one of the jurors, on the second day of deliberations, said that she had gone to the internet and looked up Narcan. This juror told the others that they didn't have to worry about it, as it had no effect on the body as far as alcohol content. Breidenbach told the juror that she was not supposed to do that, and the juror responded that she didn't care. Defendant filed a MAR on 17 December 2008.

The trial court issued an order on 19 February 2009 in which it found as a fact that Juror Bumgarner did commit the alleged misconduct. The trial court found moreover that the misconduct violated Defendant's constitutional right to confront the witnesses against him. However the trial court denied the MAR on the ground that the constitutional violation was harmless beyond a reasonable doubt.

Defendant argues that the trial court's disposition of his MAR is incorrect for two reasons: (1) the trial court did not apply the correct legal standard of prejudice; (2) the trial court's conclusion that the misconduct was harmless beyond a reasonable doubt is not supported by the record. Defendant contests the factual basis of the trial court's findings of fact Nos. 14 and 8. These arguments are addressed in turn.

"When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998). "Competent evidence is evidence 'that a rea-

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

sonable mind might accept as adequate to support the finding.’ ” *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (quoting *Andrews v. Fulcher Tire Sales & Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995)). The trial court’s conclusions of law are reviewed de novo. *Wilkins*, 131 N.C. App. at 223, 506 S.E.2d at 276.

Defendant first argues that, in allowing the State to rebut the presumption of prejudice by showing that the misconduct was harmless beyond a reasonable doubt, the trial court did not apply the correct legal standard. Defendant contends that the juror misconduct violated Defendant’s constitutional right to a jury of twelve. Defendant asserts that this was reversible error per se.

Defendant does not cite any authority for the proposition that juror misconduct is tantamount to a violation of his right to a jury of twelve, or that such error is reversible per se. Moreover, Defendant raised only the issue of his confrontation rights in his MAR. He raises a violation of his right to a jury of twelve for the first time on appeal. As such, Defendant has not preserved the issue of whether his right to a jury of twelve has been violated. See N.C. R. App. P. 10(a) (2010); *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (“The defendant may not change his position from that taken at trial to obtain a ‘steadier mount’ on appeal.”) (quoting *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)), *appeal dismissed, disc. review denied*, 329 N.C. 504, 407 S.E.2d 550 (1991).

[7] We now consider whether the trial court applied the correct standard to the constitutional violation Defendant has preserved.

A criminal defendant’s right to confront the witnesses and evidence against him is guaranteed by the Sixth Amendment to the United States Constitution and by Article 1, Section 23 of the North Carolina Constitution. A fundamental aspect of that right is that a jury’s verdict must be based on *evidence produced at trial*, not on extrinsic evidence which has escaped the rules of evidence, supervision of the court, and other procedural safeguards of a fair trial.

State v. Lyles, 94 N.C. App. 240, 247, 380 S.E.2d 390, 394 (1989). The Court in *Lyles* held that the trial court erred by placing the burden of showing prejudice from such a violation on defendant. *Id.* at 248, 380 S.E.2d at 395. It went on to determine whether the evidence presented at the hearing established that the error was harmless beyond a reasonable doubt. *Id.* at 249, 380 S.E.2d at 395-96. The trial

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

court here properly placed the burden on the State to rebut the presumption of prejudice. It went on to determine whether the State demonstrated that the violation was harmless beyond a reasonable doubt. Thus, the trial court here applied the correct legal standard.

[8] Defendant next argues that the trial court's conclusion that the misconduct was harmless beyond a reasonable doubt is not supported by the record. Defendant challenges the trial court's findings of fact Nos. 8 and 14. The trial court found as a fact:

8. That Juror Breidenbach stated that on the second day of deliberations, Juror #4, Sarah Bumgarner, told the rest of the jurors that she had looked up the drug Narcan on the internet and that it had no effect on the body as to alcohol content. Juror Bumgarner did not tell the other jurors what website she read, who the author of the information was, what date the information was published, or any other details about the information.

Defendant alleges that no evidence supports the Trial Court's finding of fact No. 8 that Bumgarner did not share other details with jurors about the nature and content of the information she unlawfully researched. The following portion of Breidenbach's testimony is competent evidence to support the finding:

THE COURT: Where did she say this information came from?

MS. BREIDENBACH: The Internet.

THE COURT: Anything more specific than that?

MS. BREIDENBACH: No; . . .

Defendant also argues that the evidence does not support the trial court's finding of fact No. 14. The trial court there found:

14. That Defense counsel told the jury in his opening statement that the Defendant was given a drug called Narcan which increased his blood-alcohol level. The Defense presented no witnesses or other evidence to support the contention that Narcan increases a person's (or increased this Defendant's) blood-alcohol content. In fact, the State presented at least three witnesses who testified about the effects, or lack of effects, of Narcan. Paul Glover testified for the State that he had years of experience in the field of alcohol-testing of the breath and blood. Mr. Glover testified that Narcan has no effect whatsoever on the blood-alcohol level of a person. Mr. Glover listed the ingredients

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

of Narcan and noted that alcohol was not an ingredient. Medic Randall Burch testified for the State that Narcan has no effect on the blood-alcohol level of a person. Forensic chemist Jennifer Mills testified for the State that she had thirty years experience in the field and she had never seen, read, or heard anything about Narcan affecting a person's blood-alcohol level. All were cross-examined by the defense, and their testimony as to Narcan on cross-examination was consistent with their testimony on direct examination.

Defendant takes issue with that part of the finding that states that paramedic Burch testified that Narcan has no effect on the blood-alcohol level of a person, and that Mills testified that she had never seen, read, or heard anything about Narcan affecting blood-alcohol level. The following excerpt from Defendant's cross-examination is competent evidence to support the finding with regard to Mills:

Q: And you will acknowledge that indeed there could be medicines that could be given to the Defendant that could be injected or placed into his veins that could increase the blood/alcohol content of his blood, is that correct?

A: No, sir. I am not aware of that.

Q: I am not asking you if you are aware of it. I am asking you that there can be certain medicines that can be given that would increase the alcohol content of someone's blood?

A: In my opinion, I don't know of any.

While Burch testified that Narcan does not contain any alcohol, Defendant is correct that Burch did not say explicitly that Narcan has no effect on blood-alcohol level. It does not follow, however, that the trial court's disposition of the MAR was erroneous. We must determine whether this error affected the trial court's conclusions of law.

Defendant argues that the trial court's conclusion that the misconduct was harmless beyond a reasonable doubt is erroneous in law. The trial court concluded:

6. That there is no reasonable possibility that the mentioning of an internet finding by one juror, who gave no additional details about the information, such as the name of the website, the name of the author of the material, or the date of its publication, could have had an effect on the hypothetical "average juror." Even if all of the omitted information had been shared, there is no reason-

STATE v. ARMSTRONG

[203 N.C. App. 399 (2010)]

able possibility that this extraneous information could have had an effect on the average juror in light of the overwhelming evidence presented by the State on the issue of Narcan and its lack of effect on a person's blood-alcohol level and in light of the lack of any evidence to the contrary. Further, the evidence of the defendant's guilt was overwhelming. Therefore, the State has shown that this constitutional violation was harmless beyond a reasonable doubt. The defendant is not entitled to a new trial or any other relief based on this allegation.

Defendant asserts that the State's evidence that Narcan has no effect on a person's blood-alcohol level was not overwhelming. Although Defendant is correct that Glover's testimony should not have been allowed, we have determined above (in section V) that Glover's testimony was cumulative of other admissible evidence. Other evidence showed that Narcan has no effect on blood-alcohol content. Defendant apparently does not disagree that there was a "lack of any evidence to the contrary."

Defendant argues vigorously that the evidence was not overwhelming, either with regard to his guilt or to the issue of Narcan in particular. We do not consider this determination dispositive.³ The question is whether Defendant was prejudiced by a violation of his right to have evidence presented at his trial. *Lyles*, 94 N.C. App. at 247, 380 S.E.2d at 394. In light of the evidence presented by the State's witnesses on the issue of Narcan's effects and the lack of Defendant's evidence to the contrary, there is no reasonable possibility that the extraneous information could have had an effect on the average juror. We hold that the trial court did not err in its conclusion of law. The trial court's denial of Defendant's Motion for Appropriate Relief is affirmed.

No prejudicial error at trial.

Denial of Defendant's MAR affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

3. It is moreover beyond the scope of our review. "Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994).

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

ANDREW GOETZ AND CATHERINE GOETZ, PERSONAL REPRESENTATIVES/GAL FOR
HAYDEN L. GOETZ, A MINOR, PLAINTIFFS V. NORTH CAROLINA DEPARTMENT OF
HEALTH & HUMAN SERVICES, DEFENDANT

No. COA09-985

(Filed 20 April 2010)

**Statutes of Limitation and Repose— untimely federal claim—
bar to state claim—childhood vaccine-related injury**

A *de novo* review revealed the full Commission erred in a case regarding the causation of a child's mental retardation and the timeliness of plaintiffs' claim for compensation under the federal and state childhood vaccine-related injury compensation programs by holding that plaintiffs' claims were not barred by the state statute of limitations under N.C.G.S. § 130A-129(c). Plaintiffs' failure to file a timely federal petition under 42 U.S.C. § 300aa-16(a)(2) barred them from bringing an action under the state program.

Appeal by defendant and cross appeal by plaintiffs from decision and order entered 6 May 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 2010.

Creech Law Firm, P.A., by Peter J. Sarda, for plaintiffs-appellees.

Attorney General Roy Cooper, by Assistant Attorney General Melody R. Hairston and Special Deputy Attorney General Amar Majmundar, for defendant-appellant.

HUNTER, Robert C., Judge.

The North Carolina Department of Health and Human Services ("defendant") appeals, and Andrew and Catherine Goetz ("plaintiffs") cross-appeal, from a 6 May 2009 Decision and Order of the Full Industrial Commission ("Full Commission") which incorporates the Full Commission's 29 August 2005 Decision and Order relating to procedure and causation and affirms the 2 September 2008 decision of the Deputy Commissioner awarding damages to plaintiffs.

This case arises out of a dispute regarding the causation of a child's mental retardation and the timeliness of plaintiffs' claim for compensation under the federal and state childhood vaccine-related injury compensation programs. Plaintiffs filed a petition with the United States Court of Federal Claims more than two years outside

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

the statute of limitations for such claims. Consequently, plaintiffs' petition was dismissed as untimely. After the United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims' decision, plaintiffs filed an election to reject federal relief and filed a state action with the North Carolina Industrial Commission. After a series of hearings and appeals, the Full Commission ultimately held that the state action was timely filed under the tolling provision of the state statute of limitations. The Full Commission heard the merits of the claim and held that plaintiffs were entitled to compensation under North Carolina's Childhood Vaccine-Related Injury Compensation Program.

Defendant now appeals from the Full Commission's order and argues that: (1) the action was not timely filed within the state statute of limitations and (2) plaintiffs did not meet their burden of establishing that Hayden Goetz's ("Hayden") DPT shots caused his medical condition. Plaintiffs cross-appeal, claiming that the Full Commission did not properly calculate the damages award. After careful review, we reverse the Full Commission's order.

Background

On 14 May 1993, Hayden was born to plaintiffs at Durham Regional Hospital in Durham, North Carolina. On 6 July 1993, at the age of two months, plaintiffs took Hayden to Durham Pediatrics in Durham, North Carolina for a check-up and the first of three DPT vaccinations. On 31 August 1993, plaintiffs returned to the pediatrician's office for Hayden's second DPT shot. Hayden received his third DPT shot at Durham Pediatrics on 19 November 1993. Although the nature of Hayden's reactions to each of these three shots is disputed, the parties agree that the medical records document that Hayden suffered a fever sometime after administration of the third DPT vaccine.

Subsequent to the administration of the DPT vaccinations, Hayden's parents, grandparents, and medical providers noticed a delay in his development, for which they sought further medical attention over the next several years. Such medical review included visits to pediatric neurologists and genetic counselors for the purpose of discovering the nature and cause of Hayden's condition. Dr. Michael Tennison ("Dr. Tennison"), who had evaluated Hayden's condition and development semi-annually over two years, ultimately indicated to plaintiffs that Hayden was mentally retarded. Testing was conducted to determine whether genetics was the cause of Hayden's condition, but the results were negative.

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

Plaintiffs then learned of Dr. Allan Lieberman ("Dr. Lieberman"), an occupational and environmental medicine specialist. Plaintiffs took Hayden to see Dr. Lieberman on 12 August 1997. Dr. Lieberman conducted "challenge testing" on Hayden, which involved exposing Hayden to a variety of inhalants, foods, and other stimuli and recording his reactions to them. Dr. Lieberman noted that Hayden had an elevated reaction when exposed to a sample of pertussis whole cell, which is a component of the DPT vaccine. Based on this test, Dr. Lieberman estimated that there was a 75-80% chance that Hayden suffered from post-immunization encephalopathy. Based on his review of Hayden's medical records, challenge testing results, and the temporal relationship between the DPT shots and Hayden's developmental changes, Dr. Lieberman concluded that the encephalopathy was related to the DPT vaccinations.

Procedural History

In March 1999, after their consultation with Dr. Lieberman, plaintiffs filed a claim for compensation for a vaccine-related injury with the United States Secretary of Health and Human Services pursuant to the Public Health Services Act. On 25 January 2001, the United States Court of Appeals for the Federal Circuit ordered the case dismissed as having been filed outside the three-year statute of limitations period set forth in 42 U.S.C. § 300aa-16 (2000). On 2 March 2001, plaintiffs filed a Form V-1 with the Industrial Commission to initiate a *de novo* state proceeding against defendant under the North Carolina Childhood Vaccine-Related Injury Compensation Program.

Pursuant to N.C. Gen. Stat. § 130A-422 *et seq.* (2009), the matter was heard before the presiding Deputy Commissioner. The Deputy Commissioner filed a Decision and Order on 17 March 2003 which determined that plaintiffs' claim was untimely due to plaintiffs' failure to file an election to reject the judgment of the United States Court of Federal Claims pursuant to 42 U.S.C. § 300aa-21(a)(2), which is a jurisdictional prerequisite to a state action under N.C. Gen. Stat. § 130A-423(b1). Both parties timely appealed to the Full Commission. After filing briefs in the matter, the parties stipulated to the admission of plaintiffs' purported "Election to File Civil Action."

On 21 August 2003, the Full Commission heard oral arguments. Prior to the filing of the Decision and Order, Commissioner Christopher Scott recused himself from the matter. On 15 December 2003, the remaining two Commissioners issued a unanimous Decision and Order in favor of defendant. Plaintiffs timely appealed to this

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

Court, which vacated and remanded the 15 December 2003 Industrial Commission Decision and Order on the grounds that Commissioner Scott's recusal denied plaintiffs their statutorily guaranteed hearing before the Full Commission. *See Goetz v. Wyeth-Lederle Vaccines*, 168 N.C. App. 712, 716-17, 608 S.E.2d 810, 813 (2005).

On 27 June 2005, the matter was heard by a panel of three new Commissioners. In its 29 August 2005 Decision and Order, the Full Commission reversed the Deputy Commissioner's 17 March 2003 Decision and Order and held that: (1) plaintiffs' state claim was timely filed due to the tolling provision of the state statute of limitations and (2) Hayden suffered a compensable vaccine-related injury under N.C. Gen. Stat. § 130A-422 *et seq.* The Full Commission remanded the case to the Deputy Commissioner on the issue of damages. Defendant subsequently filed an appeal, which was dismissed by this Court as interlocutory on 20 March 2007. *Goetz v. Wyeth-Lederle Vaccines*, 2007 WL 817417, at *3 (N.C. Ct. App. March 20, 2007). On 11 April 2007, the Full Commission again remanded the matter to the Deputy Commissioner for a hearing on the issue of damages.

On 24 April 2008, plaintiffs filed a motion for summary judgment, and defendant filed its response on 5 May 2008. After hearing oral arguments, the Deputy Commissioner filed a Decision and Order which applied the \$300,000 statutory cap to plaintiffs' damages, making no adjustment for present value. Both parties appealed to the Full Commission.

The Full Commission heard oral arguments on 10 March 2009 on the issue of damages and affirmed the Decision and Order of the Deputy Commissioner on 6 May 2009. Subsequently, both parties gave notice of appeal to this Court.

Discussion

Defendant's first argument is that the Full Commission erred in holding that plaintiffs' claims were not barred by the state statute of limitations. In the alternative, defendant argues that the Full Commission erred by admitting and relying upon incompetent evidence to establish causation. Plaintiffs argue that the Full Commission's holdings on both of these issues were proper, but that the Full Commission erred in failing to adjust the damages award to its present value. Because we agree with defendant on the first issue, we need not address the parties' remaining contentions.

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

I. Standard of Review—Statute of Limitations

Where there is no dispute over the relevant facts, a lower court's interpretation of a statute of limitations is a conclusion of law that is reviewed *de novo* on appeal. *North Carolina Dept. of Revenue v. Von Nicolai*, — N.C. App. —, —, 681 S.E.2d 431, 433 (2009) (“Since this is a question of statutory interpretation, we will conduct a *de novo* review of the [superior] court’s conclusions of law.”) (internal citations omitted). “Alleged errors of law and questions of statutory interpretation are reviewed *de novo*.” *Downs v. State*, 159 N.C. App. 220, 221-22, 582 S.E.2d 638, 639 (2003).

Although the present action is an appeal from the Decision and Order of the Full Commission instead of an appeal from the decision of a lower court, N.C. Gen. Stat. § 130A-428(c) (2009) expressly provides that the same standard of review for errors of law used in appeals from the trial courts applies to appeals from the Full Commission for actions brought under the North Carolina Childhood Vaccine Related Injury Program. This statute states in pertinent part:

[A]ny party to the proceedings may, within 30 days from the date of the decision or award, or within 30 days after receipt of notice to be sent by registered mail or certified mail of the award, but not thereafter, appeal from the decision or award of the Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the Superior Court to the Court of Appeals in ordinary civil actions.

N.C. Gen. Stat. § 130A-428(c).

In the present case, the parties stipulated to the date plaintiffs’ claim was presented under the federal compensation scheme. Further, neither party disputes the date the claim was subsequently presented to the North Carolina Industrial Commission; rather, they dispute the Industrial Commission’s interpretation and application of the state statute of limitations and its tolling provision to these dates. Thus, this Court must review the statute of limitations issue presented by this case *de novo*.

II. Interpretation of the Applicable Statute of Limitations

Defendant argues that plaintiffs’ failure to avail themselves of the federal program in a timely manner should preclude them from availing themselves of the tolling provisions set out in 42 U.S.C. § 300aa-16(c) and N.C. Gen. Stat. § 130A-429(c). Although this is a question of first impression in North Carolina, the legislative history

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

of the Federal Public Health Service Act ("Federal Vaccine Act"), codified at 42 U.S.C. § 300aa-10 *et seq.*, and the well-reasoned opinions of other jurisdictions yield compelling support for defendant's position. In order to fully understand defendant's argument, a basic understanding of the Federal Vaccine Act's purpose and administrative framework is necessary.

Enacted in 1986, the Federal Vaccine Act established a remedial no-fault compensation program for vaccine-related injuries or deaths. 42 U.S.C. § 300aa-10 *et seq.* The Act was designed to protect the nation's vaccine supply and to create a fair and easily administered program to provide compensation for vaccine-related injuries. H.R. Rep. No. 99-908, at 5-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6346-48. The statute has a two-fold policy: to expedite the award of damages and to protect vaccine manufacturers from burdensome litigation. *Id.* at 4, *reprinted in* 1986 U.S.C.C.A.N. at 6344-45. To that end, Congress included a strict 36-month statute of limitations that runs from the onset of symptoms. *Id.* at 22-23, *reprinted in* 1986 U.S.C.C.A.N. at 6363-64. The program requires that a person seeking compensation for a vaccine-related injury must first file a petition against the United States Secretary of Health and Human Services before traditional tort remedies may be pursued. 42 U.S.C. § 300aa-11(a)(2)(A); *see also Shalala v. Whitecotton*, 514 U.S. 268, 270, 131 L. Ed. 2d 374, 378 (1995) (explaining that a claimant alleging an injury after the Federal Vaccine Act's effective date "must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any *de novo* civil action in state or federal court").

Claims are heard by special masters appointed by the Court of Federal Claims, are adjudicated informally, 42 U.S.C. § 300aa-12(d)(2), and are then accorded expeditious review by the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit. 42 U.S.C. § 300aa-12(e)(2); *Whitecotton*, 514 U.S. at 270, 131 L. Ed. 2d at 378. Compensation awards are paid from the Vaccine Injury Compensation Trust Fund, which is financed by excise taxes on certain vaccines. 42 U.S.C. § 300aa-15(i)(2); 26 U.S.C. § 9510(b)(1) (2000). The Federal Vaccine Act does not totally preempt all traditional tort remedies for covered damages. *Whitecotton*, 514 U.S. at 270, 131 L. Ed. 2d at 378. Rather, after the Court of Federal Claims renders a ruling on a claim, the claimant may accept or reject any award. 42 U.S.C. § 300aa-21. If he accepts an award, he waives further tort rights; if he declines it, he may pursue traditional tort relief, subject to some restrictions. *Id.*

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

North Carolina's Childhood Vaccine-Related Injury Compensation Program, N.C. Gen. Stat. § 130A-422 *et seq.*, cross-references and incorporates the Federal Vaccine Act. *See* N.C. Gen. Stat. § 130A-423(b1) ("A claimant may file a petition pursuant to this Article only after the claimant has filed an election pursuant to Section 2121 of the [Federal Vaccine Act]. . . ."); *see also* N.C. Gen. Stat. § 130A-423(d) (limiting certain recoveries under the state program when relief has been obtained under the Federal Vaccine Act); N.C. Gen. Stat. § 130A-423(e) (preventing the recovery of duplicative damages or imposition of double liability where a claimant seeks an award under the state program through a suit against the manufacturer which is permissible under the Federal Vaccine Act); N.C. Gen. Stat. § 130A-423(f) (addressing subrogation claims pursued under the Federal Vaccine Act against awards under the state program); N.C. Gen. Stat. § 130A-425(b)(7) (requiring a claimant under the state program to file documentation showing that the claimant made an election to reject relief under the Federal Vaccine Act as part of his or her petition to the Industrial Commission); N.C. Gen. Stat. § 130A-429(c) (staying the state statute of limitations during the pendency of proceedings under the Federal Vaccine Act). The North Carolina statute functions as an exclusive remedy for state claims covered under its provisions, and its enforcement has been delegated to the North Carolina Industrial Commission. N.C. Gen. Stat. § 130A-423(b); N.C. Gen. Stat. § 130A-424.

The North Carolina statute provides that claims involving injuries alleged to have been caused by a vaccine must be brought within six years of the administration of that vaccine to avoid being time-barred. N.C. Gen. Stat. § 130A-429(a). The limitations period is tolled during the pendency of a claim in the federal program, ending 120 days after the date a final judgment is entered on the federal petition. N.C. Gen. Stat. § 130A-429(c). That section states in its entirety: "The period of limitation set forth in this section shall be stayed beginning on the date the claimant files a petition under Section 2111 of the Public Health Service Act, P.L. 99-660, and ending 120 days after the date final judgment is entered on the petition." *Id.* Like North Carolina, all other states have enacted statutes of limitation that extend beyond the federal 36-month limitation and that toll for even longer periods, if necessary, pending a judgment in the federal proceedings. *See, e.g.*, Colo. Rev. Stat. §§ 13-81-101(3), -103(c)(1) (2009) (requiring a "person under disability" to take action within 2 years of the disability being removed and defining "person with disability" to include minors under the age of 18); Utah Code Ann. § 78B-2-108 (2008) ("During the

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

time the person is underage or incompetent, the statute of limitations for a cause of action other than for the recovery of real property may not run.”); La. Civ. Code Ann. art. 3492 (2003) (“Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.”). In fact, many of the applicable state statutes toll until after the claimant reaches the age of majority. *See* H.R. Rep. 99-908, at 25, *reprinted in* 1986 U.S.C.C.A.N. at 6366 (“A number of States have statutes of limitations that are stayed during the period in which one is a minor.”).

Although all state legislatures have afforded a claimant a longer time in which to file an action in state court than the federal limitation period, it is clear from the text of the Federal Vaccine Act, and its legislative history, that a claimant must file a timely petition and exhaust all of the Federal Vaccine Act’s requirements as a precondition to the maintenance of a valid state action. Without having filed a timely federal petition, the longer state statutes of limitation and tolling provisions are irrelevant to a claimant. Otherwise, as defendant points out, allowing claimants to file a petition under the federal program outside the required time period would have the effect of converting the state program into the primary source of recovery. Contrary to the intent of Congress, discussed *supra*, a plaintiff could intentionally avoid pursuing his or her federal remedies and instead litigate a claim solely under North Carolina’s statute. Under this scenario, a plaintiff would need only wait until the federal statute of limitations has run, knowingly file a federal petition which is subject to dismissal for untimeliness, and then proceed under the applicable state statute. Because most states provide very lengthy statutes of limitations for minors and the federal program would be so easy to avoid, this interpretation would actually exacerbate one of the very problems Congress sought to address—insulating vaccine manufacturers from stale claims and giving them predictability regarding exposure to litigation. *Id.* at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 6353-54.

Other courts handling cases similar to the case at bar have agreed with, and elaborated on, this logic. *See, e.g., Blackmon v. American Home Products Corp.*, 328 F.Supp.2d 647, 653-54 (S.D. Tex. 2004). Facing a similar statute of limitations question to the one involved in

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

the present case, the *Blackmon* court asserted that “[p]laintiffs’ interpretation of the Vaccine Act violates the ‘elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.’” *Id.* at 653 (quoting *Whitcotton*, 514 U.S. at 278, 131 L. Ed. 2d at 383 (O’Connor, J., concurring)). The *Blackmon* court further reasoned:

Plaintiffs’ overbroad reading of the qualification provision would nullify the limitations provision and, with it, the Vaccine Act itself. Under Plaintiffs’ interpretation, a potential claimant could avoid the Act’s mandatory compensation scheme entirely by simply running out the 36-month clock. The plain language of the statute, together with the logical presumption that Congress intends its laws to have some effect, weighs conclusively against Plaintiffs’ construction of the Vaccine Act.

Id. at 654. Ultimately, the *Blackmon* court dismissed plaintiffs’ civil action. *Id.* at 659.

The New Jersey Superior Court, appellate division, was one of the first state courts to squarely address the issue raised in the present case. *McDonald v. Lederle Laboratories*, 341 N.J. Super. 369, 775 A.2d 528 (2001). *McDonald* provides a thorough analysis of the proper construction of the Federal Vaccine Act and its underlying Congressional intent. Before engaging in its lengthy and well-reasoned analysis, the court succinctly stated: “We are satisfied that the plain meaning of the Act and the Congressional intent are consistent with the conclusion that failure to file a timely petition under the Program bars the later pursuit of a State tort action through the Program’s election procedure.” *Id.* at 376, 775 A.2d at 532. The court asserted that the legislative history and Congressional intent clearly require that a petition must be decided on its merits first before permitting an election to file a civil action. *Id.* at 377, 775 A.2d at 533 (“Our conclusion, that a dismissal of a petition on procedural grounds as filed untimely bars a subsequent State action, is consistent with Congress’s [sic] goal.”). The court then discussed and cited much of the Congressional record and legislative history associated with the Federal Vaccine Act. *Id.* at 377-80, 775 A.2d at 533-35. The court concluded its analysis by summarizing Congress’ goals in enacting the Federal Act as follows: “Simply put, Congress wants victims to first try the Program with the expectation that its results will be accepted. Unless a petitioner is required to fully adjudicate a claim, pursuant to the Program’s expedited procedures, Congress’s [sic] objectives will not be realized.” *Id.* at 380, 775 A.2d at 535. We agree with the

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

McDonald court and refuse to adopt a construction which would allow a claimant to circumvent the Federal Vaccine Act's procedures.

In *Dickey v. Connaught Laboratories, Inc.*, 334 Ill. App. 3d 1048, 777 N.E.2d 974 (Ill. App. 3d Dist. 2002), an Illinois appellate court held that the Federal Vaccine Act did not preempt a State's statute of limitations, but the failure to timely file a petition for compensation under the federal program barred a subsequent state civil action. In *Dickey*, as in the present case, the plaintiff child was allegedly born with no detectable abnormalities, but became developmentally delayed after receiving a DPT vaccine. *Id.* at 1049, 777 N.E.2d at 975. The child's mother petitioned the federal claims court just two weeks beyond the 36-month limit provided in 42 U.S.C. § 300aa-16(a)(2). *Id.* at 1049-50, 777 N.E.2d at 975. After the petition to the federal claims court was dismissed as time-barred, the plaintiff-mother filed a state civil action, which was dismissed. *Id.* at 1050, 777 N.E.2d at 975-76.

On appeal, the *Dickey* court, noting that the case was one of first impression, acknowledged that the Federal Vaccine Act does not expressly or impliedly preempt state law. *Id.* at 1050, 777 N.E.2d at 976. Nonetheless, it observed that Congress could mandate that a party first timely file with an administrative agency before being permitted to file a state civil action. *Id.* at 1051, 777 N.E.2d at 977. The court stated that, under 42 U.S.C. § 300aa-11(a)(2)(A), the Federal Act clearly states that "no person may bring a civil action for damages in an amount greater than \$1,000 . . . in a State or Federal court . . . unless a petition has been filed . . . for compensation under the Program," and that 42 U.S.C. § 300aa-11(a)(2)(B) further provides that an action barred under subsection (A) must be dismissed. *Id.* at 1052, 777 N.E.2d at 977-78. The court therefore concluded that the statute "clearly and unambiguously prohibits both an action and a remedy in state or federal court unless there has been a *timely* filing with the federal claims court." *Id.* at 1052, 777 N.E.2d at 978 (emphasis added). Holding that the action was appropriately dismissed by the lower court, the appellate court affirmed. *Id.* at 1055, 777 N.E.2d at 979. In *Reilly ex rel. Reilly v. Wyeth*, the Illinois appellate court recently confronted the factual and procedural scenario presented in *Dickey*, and the case at bar, and reached the same conclusion. 377 Ill. App. 3d 20, 32, 876 N.E.2d 740, 752 (Ill. App. 1st Dist. 2007) ("We agree with the court in *Dickey* that the plain language of the Act provides that a party may not sue in state court unless it has first filed a petition in the Court of Federal Claims within the requisite 36-month period.").

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

The statute of limitations issue is dispositive in the case at bar. Because plaintiffs failed to file a timely federal petition, they are barred from bringing an action under the State program. The Federal Vaccine Act expressly provides that

no [State or Federal] court may award damages in an amount greater than \$1,000 in a civil action for damages for such a vaccine-related injury or death, *unless a petition has been filed, in accordance with section 300aa-16 of this title*, for compensation under the Program for such injury or death.

42 U.S.C. § 300aa-11(2)(A) (emphasis added). To file a petition “in accordance with section 300aa-16,” a claimant must file a petition “within 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.” 42 U.S.C. § 300aa-16(a)(2) (stating that “no petition may be filed for compensation under the Program” outside the 36-month limitation period).

At the latest, Hayden’s alleged injury occurred on 19 November 1993. The first federal petition was filed in March 1999. However, plaintiffs were required to file a petition within three years of 19 November 1993 to comply with the federal statute. *See* 42 U.S.C. § 300aa-16(a)(2). Thus, plaintiffs were more than two years outside the federal statute of limitations when they filed their federal petition in March 1999. For that reason, the United States Court of Appeals for the Federal Circuit dismissed the case as time-barred on 25 January 2001. Plaintiffs filed a petition with the Industrial Commission on 2 March 2001, which was more than 6 years from the date of Hayden’s last shot. If the federal requirements had been met, plaintiffs’ 2 March 2001 filing would have fallen within the 120-day tolling provision of N.C. Gen. Stat. § 130A-129(c). However, regardless of compliance with the state limitation and state tolling periods, noncompliance with the federal statute of limitation is an absolute bar to further adjudication of the merits of plaintiffs’ claim.

Because plaintiffs failed to exhaust their federal remedies in a timely manner, their subsequent state action should have been dismissed. As explained above, any other construction would allow a claimant to circumvent the federal program by filing outside the federal limitations period but still within the state limitations period. Absent a timeliness requirement, the filing of a federal petition would be a mere technical prerequisite to filing under the state statute. This is directly contrary to Congress’ intent. This Court cannot allow a

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

construction of the Federal Vaccine Act that contravenes Congress' stated goal of expediting the presentation and resolution of claims, nor can it allow a construction which renders compliance with that Act's provisions optional. Thus, the Full Commission erred in concluding that the tolling provisions could be triggered after plaintiffs had already missed the federal Act's 36-month limitations period.

Plaintiffs argue that their case is not barred by the statute of limitations, relying heavily on the law of the case doctrine. The law of the case doctrine has been summarized as follows:

The doctrine of the law of the case generally prohibits reconsideration of issues which have been decided by the same court, or a higher court, in a prior appeal in the same case. Provided that there was a hearing on the merits and that there have been no material changes in the facts since the prior appeal, such issues may not be re-litigated in the trial court or reexamined in a second appeal. In short, issues decided in earlier appellate stages of the same litigation should not be reopened, except by a higher court, absent some significant change in circumstances. The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a flexible discretionary policy which promotes the finality and efficiency of the judicial process

5 Am. Jur. 2d *Appellate Review* § 566 (2010). Our State Supreme Court has stated that

“[w]hen an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.”

Transportation, Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 305 (1962) (Parker, J., dissenting in part)). The statute of limitations issue in this case was not decided in the prior appeals. While the Full Commission did erroneously hold at a prior stage of this litigation that the statute of limitations was tolled, this Court has only vacated and remanded a decision on other grounds and dismissed an

GOETZ v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[203 N.C. App. 421 (2010)]

appeal as interlocutory. Regarding this Court's prior order to vacate, our State Supreme Court has stated that, "[o]nce [a] judgment [is] vacated, no part of it could thereafter be the law of the case." *Alford v. Shaw*, 327 N.C. 526, 543 n.6, 398 S.E.2d 445, 455 n.6 (1990). Since the other appeal to this Court was interlocutory, there were no rulings of law which could become the law of the case. In short, the law of the case doctrine is inapposite here. The critical issue is that plaintiffs failed to satisfy the procedural requirements of the Federal Vaccine Act and therefore cannot bring a valid state action. The legislative history, rules of construction, and the decisions of other jurisdictions that have faced this question overwhelmingly support our decision.

Conclusion

The test for a valid State vaccine-injury compensation action is not, as plaintiffs suggest, "whether plaintiffs have exhausted their remedies before the U.S. Court of Federal Claims," or "whether they were successful" in that litigation. Rather, the test under 42 U.S.C. § 300aa-10 *et seq.* is whether plaintiffs filed a federal petition in a *timely* manner, exhausted their remedies, and elected to reject the resulting judgment before filing their state action. Otherwise, plaintiffs would be able to easily manipulate the federal and state statutory framework to avoid the mandatory program Congress established.

We note that the proper application of the Federal Vaccine Act and its limitation period may produce harsh results where claimants with even the clearest and most legitimate claims file their federal petitions too late. However, in setting the 36-month limitation period, Congress was well aware of the unfortunate effects childhood vaccines have on several children each year. H.R. Rep. No. 99-908, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 6345 ("While most of the Nation's children enjoy greater benefit from immunization programs, a small but significant number have been gravely injured."). Despite full awareness of the fact that many legitimate and heart-wrenching claims would thus be barred, Congress ultimately decided that the need to foster stability and predictability in the vaccine market by protecting vaccine manufacturers from exposure to stale claims outweighed the harsh results caused by denial of relief in a few cases. *Id.* at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6348 ("[T]he withdrawal of even a single manufacturer would present the very real possibility of vaccine shortages, and, in turn, increasing numbers of unimmunized children, and, perhaps, a resurgence of preventable diseases. . . . [O]nce this system is in place and manufacturers have a better sense

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

of their potential litigation obligations, a more stable childhood vaccine market will evolve.”).

Because the Full Commission erred in its interpretation of the federal and state statute of limitations periods in its 29 August 2005 Decision and Order, the findings of which are incorporated in its 6 May 2009 Decision and Order, this Court must reverse. Having so held, we need not address the parties’ remaining assignments of error.

Reversed.

Chief Judge MARTIN and Judge ERVIN concur.

IN THE MATTER OF D.L.D., JUVENILE

No. COA09-1253

(Filed 20 April 2010)

1. Search and Seizure— juvenile student—reasonableness standard—motion to suppress properly denied

The trial court did not err in denying defendant’s motion to suppress evidence discovered in defendant’s possession as a result of a search of defendant’s person. The reasonableness standard applied to the search of defendant, a juvenile student; the facts showed that the search of the juvenile was justified at its inception and was not unnecessarily intrusive in light of the juvenile’s age and gender and the nature of his infraction.

2. Confessions and Incriminating Statements— Miranda warning—unsolicited and spontaneous statement

The trial court did not err in denying defendant’s motion to suppress a statement made to a police officer while defendant, a juvenile student, was in custody but had not been read his *Miranda* rights because the statement was unsolicited and spontaneous.

3. Evidence— lay opinion testimony of police officer—not plain error

The trial court did not commit plain error by allowing a police officer to testify about common practices in drug sales as the offi-

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

cer was testifying from personal experience and it was helpful to the jury in deciding whether marijuana found in defendant's possession was for sale.

4. Drugs— possession with intent to sell or deliver—sufficient evidence—motion to dismiss properly denied

The trial court did not err in denying defendant juvenile's motion to dismiss the charge of possession with intent to sell or deliver marijuana as there was substantial evidence to support each element of the charge.

Appeal by juvenile from order entered 24 March 2009 by Judge Brian C. Wilks in Durham County District Court. Heard in the Court of Appeals 24 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Benjamin G. Goff, for the juvenile.

CALABRIA, Judge.

D.L.D. ("the juvenile") appeals an order entered 24 March 2009 adjudicating him delinquent, ordering a Level 2 disposition, and placing him under the supervision of a court counselor for a period of twelve months subject to an intermittent confinement if suspended or excluded from school. We affirm.

I. BACKGROUND

On 6 January 2009, Corporal R.A. Aleem ("Corporal Aleem") of the Durham County Sheriff's Department ("DCSD") was assigned to Hillside High School ("HHS") in Durham County, North Carolina. Corporal Aleem had worked for the DCSD for thirteen years, including six years as an undercover narcotics officer. At approximately 8:00 a.m., Corporal Aleem and HHS Assistant Principal Bob Barbour ("Barbour") reviewed surveillance video footage and when Barbour switched the viewing monitor to "live" coverage, both of them watched two male students enter a bathroom while another male student stood outside. Corporal Aleem was familiar with that bathroom because he had arrested more than a dozen suspects for controlled substances offenses. Barbour told Corporal Aleem that the scene on the monitor looked "fishy" and the two men went to "check on it."

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

As they approached the bathroom, one male student stood outside the men's bathroom, another male student stood outside the women's bathroom, and both of them stared at Barbour and Corporal Aleem. When Barbour and Corporal Aleem arrived at the men's bathroom, they observed the juvenile and two other male students exit the bathroom. When the juvenile saw Barbour and Corporal Aleem, he "immediately turned around and ran back into the bathroom." Corporal Aleem followed the juvenile into the bathroom and saw him put something inside his pants. Barbour escorted the other two students back into the bathroom. Corporal Aleem told Barbour he saw the juvenile put something into his pants. Barbour replied, "we need to check it." Corporal Aleem frisked the juvenile. The frisk revealed a container used to hold BB gun pellets. Inside the container were three individually wrapped bags of a green leafy material. Corporal Aleem identified the contents of the bags as marijuana. Based upon Corporal Aleem's training and experience, each bag was worth approximately \$20.00.

Subsequently, Corporal Aleem restrained the juvenile in handcuffs and escorted him to a conference room in the main office at HHS. Barbour stated, "we need to go ahead and check him and make sure he doesn't have anything else." At that point, Corporal Aleem searched the juvenile and discovered \$59.00 in currency in his pocket. The juvenile immediately stated, "the money was not from selling drugs," but was his mother's rent money. Barbour called the juvenile's mother, and when she arrived at HHS, she began "fussing at [the juvenile] pretty heavily" and contradicted his claim that the money was for her rent.

The juvenile was arrested and charged with possession with intent to sell or deliver marijuana. On 12 January 2009, Corporal Aleem filed a juvenile petition alleging the juvenile committed the delinquent act of possession with intent to sell or deliver marijuana. On 19 March 2009, the juvenile filed a motion to suppress all statements and evidence obtained on the ground that the statements and evidence were obtained in violation of the Fourth and Fifth Amendments to the United States Constitution, Article I, § 23, of the North Carolina Constitution, and N.C. Gen. Stat. § 7B-2101 (2008).

The adjudication was held during the 24 March 2009 Juvenile Session of Durham County District Court. During the hearing, the juvenile made an offer of proof for his motion to suppress statements and physical evidence during *voir dire* examinations of Corporal

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

Aleem. Following *voir dire*, the trial court denied the juvenile's motions to suppress. At the conclusion of the hearing, the trial court adjudicated the juvenile as delinquent and proceeded to disposition. Following a disposition hearing, the trial court entered a Level 2 disposition and placed the juvenile under the supervision of a juvenile court counselor for a period of twelve months under a number of conditions, including, *inter alia*, obtaining a substance abuse assessment, cooperating with all recommended treatment, and submitting to random alcohol and drug testing. The juvenile appeals.

II. MOTION TO SUPPRESS EVIDENCE

[1] The juvenile argues that the trial court erred by denying his motion to suppress physical evidence. More specifically, he argues that the search violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. We disagree.

“Our review of a trial court’s denial of a motion to suppress is limited to a determination of whether its findings are supported by competent evidence, and if so, whether the findings support the trial court’s conclusions of law.” *In re I.R.T.*, 184 N.C. App. 579, 584, 647 S.E.2d 129, 134 (2007) (quoting *State v. McRae*, 154 N.C. App. 624, 627-28, 573 S.E.2d 214, 217 (2002)). “The trial court’s conclusions of law, however, are reviewable *de novo*.” *In re J.D.B.*, — N.C. App. —, —, 674 S.E.2d 795, 798 (2009) (citation omitted). “However, where there is no material conflict in the evidence presented at the suppression hearing, specific findings of fact are not required.” *In re M.L.T.H.*, — N.C. App. —, —, 685 S.E.2d 117, 122, *stay granted*, 363 N.C. 744, 687 S.E.2d 687 (2009) (citation omitted). “ ‘In that event, the necessary findings are implied from the admission of the challenged evidence.’ ” *Id.* at —, 685 S.E.2d at 122 (quoting *State v. Leach*, 166 N.C. App. 711, 715, 603 S.E.2d 831, 834 (2004)).

“Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon ‘probable cause’ to believe that a violation of the law has occurred.” *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S. Ct. 733, 742, 83 L. Ed. 2d 720, 734 (1985). However, “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.” *Id.* at 341, 105 S. Ct. at 742, 183 L. Ed. 2d at 734. North Carolina has adopted the “reasonableness” standard for student searches at school. *In re D.D.*, 146 N.C. App. 309, 315, 554 S.E.2d 346, 350-51 (2001). It has also applied this standard to searches of students conducted by law enforcement officers. *In re J.F.M. & T.J.B.*, 168

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

N.C. App. 143, 147, 607 S.E.2d 304, 307 (2005). The reasonableness standard applies to “incidents where a resource officer, acting in conjunction with a school official, detains a student on school premises.” *Id.* at 148, 607 S.E.2d at 307. There are three situations when the reasonableness standard applies:

Generally, school search cases fall into three categories. First, courts apply the *T.L.O.* reasonableness standard to those cases where a school official initiates the searches on his own or law enforcement involvement is minimal. Courts characterize these cases as ones in which the police officers act in conjunction with the school official.

More recently, the *T.L.O.* standard has also been applied to cases where a school resource officer conducts a search, based upon his own investigation or at the direction of another school official, in the furtherance of well-established educational and safety goals.

...

Courts draw a clear distinction between the aforementioned categories of cases and those cases in which outside law enforcement officers search students as part of an independent investigation or in which school official[s] search students at the request or behest of the outside law enforcement officers and law enforcement agencies. Courts do not apply *T.L.O.* to these cases but instead require the traditional probable cause requirement to justify the search.

D.D., 146 N.C. App. at 318, 554 S.E.2d at 352 (internal quotations and citations omitted). Furthermore, the reasonableness standard applies in North Carolina where “a police officer works in conjunction with school officials, in varying degrees, to maintain a safe and educational environment.” *Id.* at 319, 554 S.E.2d at 353 (italics, internal quotation and citation omitted). “Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use.” *Morse v. Frederick*, 551 U.S. 393, 408, 127 S. Ct. 2618, 2628, 168 L. Ed. 2d 290, 303 (2007).

Thousands of school boards throughout the country . . . have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps the single most important factor leading schoolchildren to take drugs, and that

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

students are more likely to use drugs when the norms in school appear to tolerate such behavior.

Id. (internal quotation and citations omitted). Therefore, keeping schools drug free is vital in maintaining a safe and educational environment.

In the instant case, Corporal Aleem was assigned to HHS on 6 January 2009. He had made “numerous arrests” for controlled substances at this particular bathroom at HHS. Barbour and Corporal Aleem were conducting another investigation when they observed the monitoring cameras. Barbour directed Corporal Aleem’s attention to the scene at the bathroom where two male juveniles were entering the bathroom and one was standing outside. Barbour told Corporal Aleem that the situation “looked kind of fishy,” and suggested they go “check on it.” When Barbour and Corporal Aleem arrived at the bathroom, they observed the juvenile exiting the bathroom. When the juvenile saw the two men, he ran back into the bathroom, followed by Barbour and Corporal Aleem. When Corporal Aleem said that he saw the juvenile put something in his pants, Barbour replied, “we need to check it.” These facts show that Corporal Aleem was working in conjunction with and at the direction of Barbour to maintain a safe and educational environment at HHS, namely, keeping HHS drug-free. Therefore, the reasonableness standard under *T.L.O.* applies.

“Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.” *T.L.O.*, 469 U.S. at 341, 105 S. Ct. at 742-43, 83 L. Ed. 2d at 734 (internal quotations and citations omitted).

Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

Id. at 341-42, 105 S. Ct. at 743, 83 L. Ed. 2d at 734-35 (internal quotations, citations, and footnotes omitted). “Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

the infraction.” *Id.* at 342, 105 S. Ct. at 743, 83 L. Ed. 2d at 735 (footnote omitted).

In the instant case, Barbour and Corporal Aleem observed three male students approach a bathroom at which Corporal Aleem had arrested numerous people for possession of controlled substances. Two of the students entered the bathroom while the third, who was supposed to be in class, waited outside. When Barbour and Corporal Aleem went to the bathroom to investigate, they saw one male student standing outside the men’s bathroom and another male student standing outside the women’s bathroom; both students just stared at Barbour and Corporal Aleem. The two men then observed three male students, including the juvenile, exiting the men’s bathroom. When the juvenile saw Barbour and Corporal Aleem, he immediately turned and ran back into the bathroom. The two men followed the juvenile, and Corporal Aleem observed him placing something inside his pants. These facts show that the search of the juvenile was “justified at its inception” because there were reasonable grounds to suspect that the search would turn up evidence that the juvenile violated the law and school rules by possessing controlled substances on school property.

As for the second prong of the reasonableness standard, we have held that an officer’s pat-down of a student, based on the officer’s detection of a strong odor of marijuana about the student, which produced plastic bags containing marijuana, “was not excessively intrusive in light of the age and gender of the juvenile and the nature of the suspicion.” *In re S.W.*, 171 N.C. App. 335, 339, 614 S.E.2d 424, 427 (2005). In the instant case, the juvenile’s behavior—exiting a school bathroom where others had been arrested for drug offenses, observing a school official and a law enforcement officer, turning and running back into the bathroom, and placing an item inside his pants—provided the nature of the suspicion. Once Corporal Aleem saw the juvenile place an object inside his pants, Corporal Aleem frisked him around his waistband and discovered a container which had three bags of marijuana in it. Therefore, the search was not unnecessarily intrusive in light of the juvenile’s age and gender and the nature of his infraction.

The juvenile also argues that the search in the conference room required probable cause. However, the reasonableness standard applied to the second search because Barbour and Corporal Aleem were working together to ensure a drug-free school. The search was

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

justified at its inception because Corporal Aleem had already found controlled substances inside the juvenile's pants pocket. There is also no evidence that the search was "excessively intrusive in light of the age and gender of the juvenile and the nature of the suspicion." *S.W.*, 171 N.C. App. at 339, 614 S.E.2d at 427. The foregoing supports a finding that both searches were constitutional under the standard articulated in *T.L.O.* The juvenile's assignment of error is overruled.

III. MOTION TO SUPPRESS STATEMENTS

[2] The juvenile argues that the trial court erred in denying his motion to suppress his statement to Corporal Aleem. We disagree.

"We begin by noting that the trial court's findings of fact after a hearing concerning the admissibility of a [statement] are conclusive and binding on this Court when supported by competent evidence." *J.D.B.*, — N.C. App. at —, 674 S.E.2d at 798 (citation omitted). "The trial court's conclusions of law, however, are reviewable *de novo*." *Id.* (citation omitted).

[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the [Fifth Amendment] privilege against self-incrimination is jeopardized.

...

[The individual] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966). N.C. Gen. Stat. § 7B-2101 (2007) provides additional protections for juveniles:

- (a) Any juvenile in custody must be advised prior to questioning:
 - (1) That the juvenile has a right to remain silent;
 - (2) That any statement the juvenile does make can be and may be used against the juvenile;
 - (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

- (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

Id.

"*Miranda* warnings protect a defendant from coercive custodial interrogation by informing the defendant of his or her rights." *State v. Al-Bayyinah*, 359 N.C. 741, 749, 616 S.E.2d 500, 507 (2005) (citation omitted). " 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L. Ed. 2d 297, 307 (1980) (footnote omitted). "The protections of *Miranda* and section 7B-2101(a) apply only to custodial interrogations by law enforcement." *In re J.D.B.*, — N.C. —, —, 686 S.E.2d 135, 138 (2009). The mere fact that incriminating statements are made after a defendant is confronted with circumstances normally calling for an explanation is insufficient to render the statements incompetent. *State v. Temple*, 302 N.C. 1, 8, 273 S.E.2d 273, 278 (1981). Excited utterances by a suspect are not protected by *Miranda*. *State v. Mack*, 81 N.C. App. 578, 581-82, 345 S.E.2d 223, 225 (1986). "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726. "Volunteered statements of any kind are not barred by the Fifth Amendment . . ." *Id.* See *Wansley v. Slayton*, 487 F.2d 90, 99 (4th Cir. 1973) (holding that spontaneous statements made by a juvenile in custody to a law enforcement officer are admissible); accord *Commonwealth v. Clark C., a juvenile*, 59 Mass.App.Ct. 542, 545, 797 N.E.2d 5, 8 (2003); *State v. Dutchie*, 969 P.2d 422, 426 (Utah 1998); *Matter of Ojore F.*, 673 N.Y.S.2d 993, 996-97 (Fam. Ct. 1998); *State v. Valencia*, 186 Ariz. 493, 502-03, 924 P.2d 497, 506-07 (1996); *Shelton v. State*, 287 Ark. 322, 328, 699 S.W.2d 728, 731 (1985); *Washington v. State*, 456 N.E.2d 382, 384 (Ind. 1983); *In re Robert D.*, 72 Cal.App.3d 180, 184-85, 139 Cal.Rptr. 840, 843 (1977); *Interest of Thompson*, 241 N.W.2d 2, 7-8 (Iowa 1976); *State v. Stevens*, 467 S.W.2d 10, 20 (Mo. 1971); *In re Orr*, 38 Ill.2d 417, 422-24, 231 N.E.2d 424, 427-28 (1967). See also *State v. Burge*, 362 So.2d 1371, 1374 (La. 1978) (holding that when a state provides additional protections for juveniles in custody, a juvenile's spontaneous and unsolicited statements given to a law enforcement officer while in custody are admissible even if the officer did not provide the additional protections); accord *State v. Hogan*, 297 Minn. 430, 439-41, 212 N.W.2d 664, 670-71 (1973).

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

In the instant case, after Corporal Aleem searched the juvenile in the conference room and discovered \$59.00 in currency in his pocket, Corporal Aleem testified that the juvenile responded to the search by offering the statement that the money “was not from selling drugs.” Corporal Aleem also testified that he was present in the conference room with Barbour and the juvenile. During *voir dire*, the juvenile’s counsel questioned Corporal Aleem:

Q [counsel for the juvenile]: Corporal Aleem, so after leaving the bathroom you put [the juvenile] in the conference room, correct?

A [Corporal Aleem]: Yes, ma’am.

...

Q: And he was in handcuffs?

A: Yes, ma’am.

Q: And you went to the conference room with him?

A: Yes, ma’am.

Q: And [the juvenile] wasn’t allowed to leave the conference room?

A: No, ma’am.

Q: And you searched him?

A: Yes, ma’am.

Q: You spoke with him?

A: Yes, ma’am.

Q: You asked him questions?

A: Questions about the substance or just basic talking questions?

Q: You asked him questions?

A: I talked to him, yes.

Q: And you told Assistant Principal Barber [sic] what was going on?

A: Well, he knew. He was standing there in the bathroom.

Q: And you knew he would come speak with [the juvenile]?

A: Did I know if he would come speak to [the juvenile]?

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

Q: Yes.

A: I'm sure he would talk to him about the suspensions but other than that, I mean, yes, I knew he would have a conversation with him. But other than that—

Q: But you didn't read [the juvenile] his rights?

A: No, ma'am.

Q: And his mother wasn't in the room?

A: No, ma'am.

...

Q: And [the juvenile] didn't wait to have her present?

A: No, ma'am.

Corporal Aleem then gave the following uncontradicted testimony:

Q [the State]: Who was conducting the conversation [in the conference room]? Was it yourself or was [it] Mr. Barbour?

A [Corporal Aleem]: Mr. Barbour was speaking.

Q: And you were just present during the conversation?

A: Yes.

...

Q [the trial court]: Mr. Aleem, were you asking the questions or was it Assistant [Principal] Barber [sic] who asked the questions of the juvenile?

A: Sir, Mr. Barbour asked the questions. Specifically to the money?

Q: Um-huh.

A: That was a spontaneous utterage [sic]. I never asked him anything. When I seized the money that's when he told me what the money was for. So I never asked him a question. That came spontaneously from him.

This evidence supports the trial court's finding and conclusion that the juvenile "made statements not at the questioning of the officers[.]" Therefore, the juvenile's statement was admissible because it was "unsolicited and spontaneous." *State v. Hall*, 131 N.C. App. 427,

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

436, 508 S.E.2d 8, 14 (1998). The trial court did not err in denying the juvenile's motion to suppress. The juvenile's assignment of error is overruled.

IV. PLAIN ERROR

[3] The juvenile argues the trial court committed plain error in allowing Corporal Aleem to testify outside the area of his stated expertise. We disagree.

"[P]lain error 'only applies to jury instructions and evidentiary matters in criminal cases.' " *In re D.M.B.*, — N.C. App. —, —, 676 S.E.2d 66, 68 (2009) (quoting *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004)). " "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the [trial court] probably would have reached a different result.' " *In re T.R.B.*, 157 N.C. App. 609, 617, 582 S.E.2d 279, 284 (2003) (quoting *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002)). However, a prerequisite to our engaging in a "plain error" analysis is for us to determine whether the action complained of constitutes error at all. *State v. Spencer*, 192 N.C. App. 143, 152, 664 S.E.2d 601, 607 (2008).

In the instant case, the juvenile asks this Court to review for plain error because he did not object to Corporal Aleem's testimony at trial. *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983). Our analysis of this issue is guided by our recent decision in *State v. Hargrave*, — N.C. App. —, 680 S.E.2d 254 (2009). In *Hargrave*, the defendant alleged that the trial court erred by allowing law enforcement officers to give lay opinion testimony that controlled substances found on the defendant were "packaged as if for sale and that the total amount of money and the number of twenty-dollar bills found on [the] defendant were indicative of drug sales." *Id.* at —, 680 S.E.2d at 257. The defendant contended the officers needed to be qualified as experts before giving such testimony. *Id.* at —, 680 S.E.2d at 257. This Court disagreed, stating, "the testimony of each of the officers in the instant case was based on personal experience and was helpful to the jury in deciding whether the cocaine was for sale." *Id.* at —, 680 S.E.2d at 258. "[T]he officers' respective testimony was based on personal knowledge of drug practices. The testimony was also relevant because the fact that defendant had cocaine packaged for sale increases the likelihood that he was selling cocaine.

Accordingly, we hold that the trial court *did not err* in admitting this testimony." *Id.* at —, 680 S.E.2d at 258 (emphasis added). *See*

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

State v. Bunch, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991) (holding that an officer can give opinion testimony as a lay witness as to the common practice in drug sales of having one person hold the money and another hold the drugs); *State v. Hart*, 66 N.C. App. 702, 703, 311 S.E.2d 630, 631 (1984) (holding that an officer can give opinion testimony as a lay witness that chemicals found in the defendant's home were often used in the heroin trade).

In the instant case, Corporal Aleem worked for the DCSD for thirteen years, including six years in undercover narcotics investigations. He had also been trained in the recognition of marijuana, attended an advanced narcotics investigator's course which included controlled substance recognition, and participated in recurrent training including marijuana spotters courses. Corporal Aleem also testified as follows:

Q [the State]: Officer, in the course of your experience in narcotics is it traditional for a person selling drugs to have in his possession both money and drugs?

A [Corporal Aleem]: Yes.

Q: Is it also traditional in your experience for a person to have a low amount of inventory and a high amount of money or *vice versa*, a high amount of inventory and a low amount of money?

A: Depends on how business is. I mean, if he hasn't started selling yet he's going to have more inventory than he does money. If he's selling pretty good that means he's has [sic] more money than he does inventory.

Based on our reasoning in *Hargrave*, the trial court did not err in admitting Corporal Aleem's testimony because it was based on personal experience and was helpful to the trial court in deciding whether the marijuana was for sale. The testimony was also relevant because the juvenile possessed \$59.00 and three small bags of marijuana worth \$20.00 each. Both facts increased the likelihood that he was selling marijuana. *Hargrave*, — N.C. App. at —, 680 S.E.2d at 258. The juvenile's assignment of error is overruled.

V. MOTION TO DISMISS

[4] The juvenile argues that the trial court erred in entering judgment and denying the juvenile's motion to dismiss where there was insufficient evidence to support the entry of the order. We disagree.

IN RE D.L.D.

[203 N.C. App. 434 (2010)]

“We review a trial court’s denial of a motion to dismiss *de novo*.” *In re S.M.S.*, — N.C. App. —, —, 675 S.E.2d 44, 45 (2009) (citation omitted). “Where the juvenile moves to dismiss, the trial court must determine ‘whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile’s] being the perpetrator of such offense.’” *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). “‘Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion.’” *In re S.R.S.*, 180 N.C. App. 151, 156, 636 S.E.2d 277, 281 (2006) (quoting *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005)). “The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence.” *In re Eller*, 331 N.C. 714, 717, 417 S.E.2d 479, 481 (1992) (citing *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980)).

The offense of possession with intent to sell or deliver has three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance. While intent may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred. Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount.

I.R.T., 184 N.C. App. at 588, 647 S.E.2d at 136-37 (quoting *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175-76 (2005)) (internal quotation and citations omitted). “‘Based on North Carolina case law, the intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant’s activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.’” *Id.* at 588, 647 S.E.2d at 137 (quoting *Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176). “Even where the amount of drugs involved is small, the surrounding circumstances may allow the jury to find an intent to distribute.” *State v. James*, 81 N.C. App. 91, 94, 344 S.E.2d 77, 80 (1986). *See State v. Williams*, 71 N.C. App. 136, 139-40, 321 S.E.2d 561, 564 (1984) (less than one ounce of marijuana packaged in a number of small containers was sufficient to raise a presumption that the marijuana was possessed for sale and delivery).

In the instant case, when the juvenile observed Barbour and Corporal Aleem outside the bathroom, the juvenile ran back inside

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

and placed an object inside his pants. The object was a container. Inside the container were three individually wrapped bags of marijuana valued at approximately \$20.00 each. The juvenile also possessed \$59.00 in currency. When Corporal Aleem discovered the currency, the juvenile spontaneously stated that the money did not come “from selling drugs.” When viewed in the light most favorable to the State, there was substantial evidence that the juvenile possessed a controlled substance, *i.e.*, marijuana, with the intent to sell or distribute it. The juvenile’s assignment of error is overruled.

VI. CONCLUSION

The trial court’s adjudication and disposition orders are affirmed.

Affirmed.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

STATE OF NORTH CAROLINA v. STEVEN DAVID TAYLOR, DEFENDANT

No. COA09-1360

(Filed 20 April 2010)

1. Indictment and Information— variance—possession of firearm by felon—habitual felon—date of prior felony not essential element

The trial court did not err by denying defendant’s motion to dismiss the charges of possession of a firearm by a felon and attaining the status of a habitual felon based on a variance in the indictments. The date a defendant committed a prior felony was not an essential element of either charge, and thus the discrepancy of dates in the indictments was not a fatal variance.

2. Indictment and Information— motion to amend—habitual felon—date of commission of prior felony

The trial court did not err by granting the State’s motion to amend defendant’s habitual felon indictment under N.C.G.S. § 14-7.3 regarding the date defendant committed a prior PWISD marijuana felony. The date was neither an essential nor a substantial fact for the habitual felon charge.

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

3. Firearms and Other Weapons— possession of firearm by felon—motion to dismiss—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm. The evidence was sufficient to permit a reasonable jury to infer that defendant constructively possessed a handgun found in the undergrowth roughly 25 to 30 feet from the door to defendant's cabin.

Appeal by defendant from judgment entered 28 May 2009 by Judge Alan Z. Thornburg in Polk County Superior Court. Heard in the Court of Appeals 24 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General E. Michael Heavner, for the State.

Mercedes O. Chut for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Steven David Taylor appeals from his convictions of possession of a firearm by a felon and having attained habitual felon status. Defendant primarily argues on appeal that the trial court erred in not dismissing both indictments for being facially insufficient to support the charges and due to a fatal variance between the indictments and the evidence at trial. We conclude, however, that the indictments are sufficient to support the offenses alleged and that there was no fatal variance between the indictments and proof at trial. Accordingly, we find no error.

Facts

The State's evidence tended to establish the following facts at trial: On 24 June 2008 defendant was placed on intensive probation after pleading guilty to fleeing/eluding arrest in a motor vehicle and failure to heed blue lights or a siren. He met with his probation officer, Officer Benjamin Lynch, the same day, telling Officer Lynch that he was living in a cabin in the woods on Amy Lane on family property in Polk County, North Carolina. Defendant's cabin is located a short distance down an unmaintained dirt road. The cabin is a one room A-frame style house with no electricity or running water. The cabin is situated at the edge of a clearing in the woods, with a small stream running directly behind it. Roughly 100 to 200 yards through the woods, there are four or five other houses located on a hill on defendant's family's property. Defendant's father lives in one house and

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

Chris Abril, a former law enforcement officer, lives in another. Between defendant's father's residence and defendant's cabin is a shooting range used by Mr. Abril.

On 29 June 2008, Officer Lynch drove to defendant's cabin to conduct a routine visit. Officer Lynch arrived at defendant's cabin around 8:00 p.m. and saw defendant standing near a fire pit in the clearing around the cabin. When defendant saw Officer Lynch pull up, he "took off" running toward the cabin and went inside. Defendant then came back outside onto the porch of the cabin, holding a cup containing "moonshine." Defendant appeared to be "extremely impaired." Officer Lynch asked defendant why he had run into the cabin and defendant responded: "Nothing." For safety purposes, Officer Lynch patted down defendant, finding in his pocket an old knife and some .45 caliber shells that smelled like they had "just recently [been] fired." He then asked defendant where he had gotten the shells and defendant responded that he had been out shooting that day, but that he had already taken the gun back to his father's house.

Officer Lynch began searching the cabin and found a small box containing what appeared to be marijuana residue and rolling papers. While Officer Lynch continued to search the cabin, defendant started rambling and asking Officer Lynch to "give him a break." Defendant eventually told Officer Lynch that he had a box of ammunition outside the cabin. Defendant took Officer Lynch outside and showed him two boxes of ammunition located approximately a foot from the cabin. The boxes contained .45 caliber shells, some of which had already been fired, and three magazines designed to hold .45 caliber shells. Two of the magazines were fully loaded. After seizing the ammunition and magazines, Officer Lynch searched the immediate area and found a .45 caliber semi-automatic handgun in the undergrowth approximately 25 to 30 feet from the door to the cabin along a trail from the road up to the cabin. After finding the gun, Officer Lynch asked defendant about it and defendant told him that it was his father's and asked if he could take it back to his father's house.

Officer Lynch then took the gun and the ammunition to secure it in his vehicle. Defendant followed Officer Lynch to his vehicle and got into the passenger seat while Officer Lynch was placing the items in the backseat. Defendant kept asking Officer Lynch to "give him a break" and allow him to take the gun back to his father. Because defendant was "acting a little strange," Officer Lynch called the Polk County Sheriff's Department for assistance. Defendant kept looking back at the gun in the backseat and at Officer Lynch's gun, so Officer

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

Lynch took the gun from the backseat and kept it with him. Concerned for his safety, Officer Lynch told defendant that he would not arrest him for a probation violation.

Officer Lynch radioed the sheriff's department again, asking that they "step . . . up" their response and defendant stated that there were other guns in the woods and that "he knew how to use them." Defendant got mad and stated that he would run away to California where no one could find him. Defendant then threatened to kill himself. When Officer Lynch called the sheriff's department again, defendant got out of the vehicle and ran into the cabin. Defendant soon came back out and showed Officer Lynch a handful of pills, claiming that they were Lortab. Defendant then swallowed the pills, grabbed the knife from the kitchen table in cabin, and "took off running up the path" towards Mr. Abril's and his father's residences. Officer Lynch immediately radioed for an ambulance and began running after defendant. Officer Lynch caught defendant, took the knife away from him, and attempted to place him under arrest. While trying to handcuff defendant, defendant "jerked away" from Officer Lynch and began running back toward his cabin. Officer Lynch ran after defendant, and when defendant tried to dodge Officer Lynch they collided and fell to the ground. Officer Lynch handcuffed defendant and placed him under arrest. After the sheriff's deputies and the ambulance arrived, defendant was taken to the hospital. The woods around defendant's cabin were searched again, but no other weapons were found.

Defendant was charged with possession of a firearm by a felon and having attained habitual felon status. Defendant pled not guilty to the charges and the case proceeded to trial. At the close of the evidence during the firearm possession phase, defendant moved to dismiss the charge for insufficient evidence. The motion was denied. Defendant also moved to dismiss the indictment on the ground that there was a fatal variance between the indictment and the proof at trial, where the judgment for defendant's prior felony of possession with intent to sell or deliver marijuana ("PWISD marijuana") indicated that the offense was committed on 18 December 1992 while the firearm possession indictment alleged that the date of commission was 8 December 1992. That motion was also denied and defendant was convicted of possession of a firearm by a felon.

Prior to presenting evidence in the habitual felon phase of the trial, the State moved to amend the indictment with respect to the date defendant committed the prior PWISD marijuana offense. The trial court granted the State's motion to amend the indictment so that

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

it alleged that the offense was committed between 8 and 18 December 1992. At the close of the evidence, defendant moved to dismiss the habitual felon indictment on the same ground as his motion to dismiss the firearm possession indictment. That motion was also denied. The jury convicted defendant of having attained habitual felon status and the trial court consolidated the firearm possession and habitual felon convictions into one judgment, sentencing defendant to a presumptive-range term of 151 to 191 months imprisonment. Defendant timely appeals to this Court.

I

[1] Defendant first argues that the trial court erred by denying his motions to dismiss the indictments for possession of a firearm by a felon and having attained habitual felon status. Defendant contends that (1) the indictments were insufficient on their faces to support the offenses for which defendant was convicted as they failed to contain information required by statute and (2) there is a fatal variance between the allegations in the indictments and the evidence at trial.

A. Sufficiency of Indictments

Defendant argues that his motions to dismiss the firearm possession and habitual felon indictments should have been granted as they fail to sufficiently allege the date defendant committed a prior felony supporting both indictments. Defendant claims that the facial deficiency of the indictments deprived the trial court of subject-matter jurisdiction to adjudicate the offenses.

Defendant was indicted for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1(a) (2009), which prohibits “any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).” The statute also specifies the information to be contained in a proper indictment for possession of a firearm by a felon: “An indictment which charges the person with violation of this section must set forth *the date that the prior offense was committed*, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein.” N.C. Gen. Stat. § 14-415.1(c) (emphasis added).

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

Defendant was also indicted for having attained habitual felon status under N.C. Gen. Stat. § 14-7.1 (2009), which defines a “habitual felon” as “[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof” *Accord State v. Patton*, 342 N.C. 633, 634, 466 S.E.2d 708, 709 (1996) (“Any person who has been convicted of or pled guilty to three felony offenses is declared by statute to be an habitual felon.”). N.C. Gen. Stat. § 14-7.3 (2009) provides in pertinent part:

An indictment which charges a person with being an habitual felon must set forth *the date that prior felony offenses were committed*, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

(Emphasis added.)

The State used defendant’s prior felony conviction of PWISD marijuana (92 CRS 1292) in support of both the firearm possession and habitual felon indictments. Both indictments allege that the PWISD marijuana offense occurred on “12/8/1992.” However, defendant’s PWISD marijuana judgment, which was introduced at trial as evidence of the present charges, identifies “12/18/92” as the date the offense was committed. Based on this discrepancy regarding the commission date of his PWISD marijuana offense, defendant maintains that the firearm possession and habitual felon indictments are insufficient under N.C. Gen. Stat. § 14-415.1(c) and N.C. Gen. Stat. § 14-7.3.

Although “a statute requires a particular allegation, the omission of such an allegation from an indictment is not necessarily fatal to jurisdiction[.]” *State v. Inman*, 174 N.C. App. 567, 569, 621 S.E.2d 306, 308 (2005), *disc. review denied*, 360 N.C. 652, 638 S.E.2d 907 (2006). As the Supreme Court has explained:

“In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory.” . . .

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

While, ordinarily, the word “must” and the word “shall,” in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute.

State v. House, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978) (quoting 73 Am. Jur. 2d *Statutes* § 19).

With respect to an indictment for possession of a firearm by a felon, this Court has held that “the provision of § 14-415.1(c) that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right” as the “[d]efendant is no less apprised of the conduct which is the subject of the accusation than he would have been if the penalty for the prior conviction had been included in the indictment.” *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004). This Court has similarly held that N.C. Gen. Stat. § 14-415.1(c)’s requirement that a firearm possession indictment state the date of a defendant’s prior felony conviction “is not material and does not affect a substantial right.” *Inman*, 174 N.C. App. at 571, 621 S.E.2d at 309.

Applying the rationale in *Boston* and *Inman* to this case, we conclude that the discrepancy regarding the date of commission of defendant’s prior felony offense is not material and does not affect a substantial right. Here, the firearm possession indictment specifies the prior felony (PWISD marijuana) and its penalty, the date of defendant’s guilty plea, the court in which defendant’s plea occurred, the file number of the case (92 CRS 1292), and defendant’s sentence. Given this information in the indictment, “[d]efendant is no less apprised of the conduct which is the subject of the accusation than he would have been” if the date of commission of his prior felony offense had been correctly included in the firearm possession indictment. *Boston*, 165 N.C. App. at 218, 598 S.E.2d at 166. “To hold otherwise would permit form to prevail over substance.” *Id.*

With respect to defendant’s habitual felon indictment, this Court has held that “the date alleged in the indictment is neither an essential nor a substantial fact as to the charge of habitual felon” *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994). It is “the fact that another felony was committed, not its specific date, which [i]s the essential question in the habitual felon indictment.” *Id.*

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

Here, defendant's habitual felon indictment provided notice of the three prior felonies being used to support the indictment, the dates the felonies were committed, the jurisdiction in which they were committed, the dates of convictions, the court in which the convictions took place, and the file numbers of the cases. Despite the discrepancy regarding the date defendant committed the prior PWISD marijuana offense, the habitual felon indictment in this case provided defendant with adequate notice of the prior felonies supporting the indictment in order for defendant to prepare a defense. *See State v. Briggs*, 137 N.C. App. 125, 130-31, 526 S.E.2d 678, 681-82 (2000) ("The purpose of an habitual felon indictment is to provide a defendant 'with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge,' and not to provide the defendant with an opportunity to defend himself against the underlying felonies. . . . [A]n indictment for habitual felon is sufficient if it provides a defendant with notice of his prior felony convictions." (quoting *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995))). We, therefore, conclude that the firearm possession and habitual felon indictments were sufficient on their faces to support the offenses of which defendant was convicted.

B. Fatal Variance

Similar to his argument regarding the sufficiency of the indictments, defendant contends that the discrepancy in the firearm possession and habitual felon indictments and defendant's PWISD marijuana judgment regarding the date defendant committed the prior felony is a fatal variance between the allegations in the indictments and the proof at trial. A motion to dismiss based on a variance "is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged." *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). A variance between the criminal offense charged in the indictment and the offense established by the evidence is, in essence, a failure of the State to establish the offense charged. *State v. Pickens*, 346 N.C. 628, 645-46, 488 S.E.2d 162, 172 (1997). Not every variance, however, is sufficient to require dismissal. *State v. Rawls*, 70 N.C. App. 230, 232, 319 S.E.2d 622, 624 (1984), *cert. denied*, 317 N.C. 713, 347 S.E.2d 451 (1986). "[T]he defendant must show a fatal variance between the offense charged and the proof as to '[t]he gist of the offense.'" *Pickens*, 346 N.C. at 646, 488 S.E.2d at 172 (quoting *Waddell*, 279 N.C. at 445, 183 S.E.2d at 646). In order to be fatal, the variance must relate to an "essential element of the offense." *Id.* The purpose for prohibiting a variance between allega-

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

tions contained in an indictment and evidence established at trial is to enable the defendant to prepare a defense against the crime with which the defendant is charged and to protect the defendant from another prosecution for the same incident. *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002).

Where the date of the commission of an offense is not an “essential ingredient of the offense charged,” the State may “prove that it was committed on some other date.” *State v. Wilson*, 264 N.C. 373, 377, 141 S.E.2d 801, 804 (1965). “The failure to state accurately the date or time an offense is alleged to have occurred does not invalidate a bill of indictment nor does it justify reversal of a conviction obtained thereon.” *Locklear*, 117 N.C. App. at 260, 450 S.E.2d at 519 (quoting *State v. Cameron*, 83 N.C. App. 69, 72, 349 S.E.2d 327, 329 (1986)).

The “gist” of the offense of possession of a firearm by a felon is the present possession of a firearm by a person previously convicted of a felony. N.C. Gen. Stat. § 14-415.1(a). The precise date on which that prior felony was committed is not essential to the charge. See *Inman*, 174 N.C. App. at 571, 621 S.E.2d at 309; *Boston*, 165 N.C. App. at 218, 598 S.E.2d at 166.

Although a status, and not a substantive offense, the purpose of charging a defendant with having attained habitual felon status is to “enhance the punishment which would otherwise be appropriate for the substantive felony which [the defendant] has allegedly committed while in such a status.” *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). The date of commission of a prior felony offense is not essential to a charge of having attained habitual felon status. *State v. Spruill*, 89 N.C. App. 580, 582, 366 S.E.2d 547, 548 (holding that there was no fatal variance between habitual felon indictment and evidence at trial regarding date of commission of offense as “[t]ime [i]s not of the essence as to this offense”), *cert. denied*, 323 N.C. 368, 373 S.E.2d 554 (1988).

The date on which a defendant committed a prior felony is not an essential element of either possession of a firearm by a felon or having attained habitual felon status. Thus, the discrepancy in the indictments alleging that defendant committed the prior PWISD marijuana felony on 8 December 1992 and the PWISD marijuana judgment stating that the offense was committed on 18 December 1992 is not a fatal variance. The trial court properly denied defendant’s motion to dismiss.

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

II

[2] Defendant next argues that the trial court erred in granting the State's motion to amend his habitual felon indictment under N.C. Gen. Stat. § 14-7.3. After the jury found defendant guilty of possession of a firearm by a felon, the prosecutor, over defendant's objection, moved to amend the habitual felon indictment to "expand the date of offense [for defendant's PWISD felony] to 12-8-1992 through 12-18-1992." The trial court granted the motion to amend the indictment as to the date defendant committed the prior PWISD marijuana felony, and copies of defendant's three prior felonies referenced in the indictment were admitted and published to the jury, including the PWISD marijuana indictment indicating that the offense occurred on 18 December 1992.¹

N.C. Gen. Stat. § 15A-923(e) (2009) provides that "[a] bill of indictment may not be amended." This statute, however, has been interpreted to prohibit only those changes " 'which would substantially alter the charge set forth in the indictment.' " *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *appeal dismissed and disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)). "A change in an indictment does not constitute an amendment where the variance was inadvertent and [the] defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). "[W]here time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not 'substantially alter the charge set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (quoting *Price*, 310 N.C. at 598-99, 313 S.E.2d at 559)).

With respect to amendments to habitual felon indictments regarding the date a defendant committed a prior felony supporting the indictment, this Court has held that "the date alleged in the indictment is neither an essential nor a substantial fact as to the charge of habitual felon" *Locklear*, 117 N.C. App. at 260, 450 S.E.2d at 519. "[I]t [i]s the fact that another felony was committed, not its specific date, which [i]s the essential question in the habitual felon indic-

1. Defendant's other two prior felonies referenced in his habitual felon indictment—felony breaking and entering and felony fleeing/eluding arrest—are not at issue here as the indictment was not amended with respect to these offenses.

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

ment.” *Id.* The trial court, therefore, may properly permit amendment to a habitual felon indictment to alter the date of commission of an underlying felony under N.C. Gen. Stat. § 15A-923(e).

Here, although the amendment to defendant’s habitual felon indictment changed the date of commission of defendant’s PWISD marijuana felony, the amendment did not alter the stated offense, the file number of the case, the date on which defendant pled guilty to the charge, or the court in which defendant pled guilty. The indictment in this case provided adequate notice to defendant of the specific felony convictions supporting the charge of his having attained habitual felon status. *See State v. Lewis*, 162 N.C. App. 277, 285, 590 S.E.2d 318, 324 (2004) (holding trial court did not err in amending habitual felon indictment to change date and county of conviction of prior felony where indictment included other information “sufficient[] [to] notif[y] defendant of the particular conviction that was being used to support his status as an habitual felon”). The trial court, therefore, did not err in allowing the State to amend the indictment.

III

[3] In his final argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss the possession of a firearm by a felon charge for insufficient evidence. An appellate court “reviews the denial of a motion to dismiss for insufficient evidence *de novo*.” *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008). A defendant’s motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant’s being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State.” *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

In order to obtain a conviction for possession of a firearm by a felon, the State must establish that (1) the defendant has been convicted of or pled guilty to a felony and (2) the defendant, subsequent to the conviction or guilty, possessed a firearm. *State v. Wood*, 185

STATE v. TAYLOR

[203 N.C. App. 448 (2010)]

N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007); N.C. Gen. Stat. § 14-415.1(a). Defendant does not challenge his status as a convicted felon—only the sufficiency of the evidence regarding his possession of a firearm. Defendant argues that the State failed to present substantial evidence that he was in possession of the handgun found in the undergrowth roughly 25 to 30 feet from the door to defendant's cabin.

Possession of a firearm may be actual or constructive. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). Actual possession requires that the defendant have physical or personal custody of the firearm. *Id.* In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use. *Id.* When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. *State v. Young*, 190 N.C. App. 458, 461, 660 S.E.2d 574, 577 (2008). Constructive possession depends on the totality of the circumstances in each case. *State v. Glasco*, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003).

In this case, the State proceeded at trial on the theory of constructive possession and thus was required to prove the existence of other incriminating circumstances. The evidence presented at trial tends to establish that Officer Lynch went to defendant's cabin for a routine probation visit on 29 June 2008 and that when defendant saw Officer Lynch driving up to the cabin, he "took off toward the house" and ran inside. Officer Lynch frisked defendant for safety reasons and found in his pockets an old knife and several spent .45 caliber shells that smelled like they had "just recently [been] fired." When asked about the shells, defendant told Officer Lynch that he had been "outside shooting that day" but that he had "already got rid of the weapon."

Officer Lynch asked defendant if he had any more ammunition or guns and defendant told him that there was a box of ammunition outside the cabin. Defendant took Officer Lynch outside and showed him two boxes of ammunition within a foot of the cabin. The boxes contained .45 caliber shells, some of which were "used and spent," matching the type found in defendant's pocket. The boxes also contained three magazines for a .45 caliber firearm; two were loaded and one was empty. Officer Lynch then searched the area around where

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

the ammunition and magazines were located and found a .45 caliber semi-automatic handgun in the undergrowth approximately 25 to 30 feet from the door to the cabin along a trail from the road up to the cabin. Officer Lynch searched this area because defendant ran along the trail into the cabin when Officer Lynch first arrived and Officer Lynch believed defendant would have been able to throw a gun in this area while running into the cabin. After finding the gun, Officer Lynch asked defendant about it and defendant told him that it was his father's and asked if he could take it back to him.

This evidence is sufficient to permit a reasonable jury to infer that defendant possessed the firearm in violation of N.C. Gen. Stat. § 14-415.1(a). *See State v. Jones*, 161 N.C. App. 615, 624, 589 S.E.2d 374, 379 (2003) ("Because defendant acknowledges his possession of the gun in this statement, it effectively disposes of his argument that there is no evidence of possession."), *appeal dismissed and disc. review denied*, 358 N.C. 379, 597 S.E.2d 770 (2004); *Glasco*, 160 N.C. App. at 157, 585 S.E.2d at 262 (concluding circumstantial evidence was sufficient to withstand motion to dismiss charge of firearm possession where defendant was found carrying a bag containing firearm residue and a rifle was found concealed in a pile of tires near where defendant had been recently seen). The trial court, therefore, properly denied defendant's motion to dismiss the charge of possession of a firearm by a felon.

No Error.

Judges CALABRIA and HUNTER, Robert N., Jr. concur.

ANNE SCOTT, ADMINISTRATOR FOR THE ESTATE OF DAVID SCOTT, AND ANNE SCOTT,
INDIVIDUALLY, PLAINTIFF V. CITY OF CHARLOTTE, DEFENDANT

No. COA09-893

(Filed 20 April 2010)

Immunity— governmental—public duty doctrine—summary judgment

The trial court erred in denying defendant City of Charlotte's motion for summary judgment on plaintiff's negligence claims. The public duty doctrine barred plaintiff's claims that city police officers were negligent in failing to summon medical assistance

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

for her husband who appeared to be physically impaired in some respect. The officers were providing police protection to the general public, made a discretionary decision causing indirect harm to the individual, and had no duty to summon medical help, especially when the individual declined assistance. Moreover, no exceptions to the public duty doctrine were applicable.

Appeal by defendant from order entered 30 January 2009 by Judge Nathaniel Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2010.

DeVore, Acton & Stafford, PA, by Fred W. DeVore, III; Kuruc Law Offices, by Joan Kuruc, for plaintiff-appellee.

Gray King Chamberlin & Martineau, LLC, by L. Kristin King and Jennifer P. Pulley, for defendant-appellant.

HUNTER, Robert C., Judge.

The City of Charlotte (“defendant” or “the City”) appeals from the trial court’s denial of its motion for summary judgment. After careful review, we reverse the trial court’s order.

Background

At approximately 9:00 a.m. on 12 November 2005, a call was placed to the Charlotte 911 dispatch center reporting an erratic driver. The Charlotte Mecklenburg Police Department was notified and Officer Todd Davis (“Officer Davis”) located the reported vehicle. Officer Davis pulled in behind the vehicle and activated his lights and siren. The driver of the vehicle then pulled over on the side of the road. Officer Davis received back-up assistance from Officer Brandy Lingle (“Officer Lingle”) and Officer Erika Conway (“Officer Conway”).¹

Officer Davis asked the driver for his license and registration, which he produced. The driver was identified as David Scott (“Mr. Scott”). Upon questioning by Officer Davis, Mr. Scott explained that he had driven from Cary, North Carolina that morning and was heading to a job site where he had left some work related materials that he needed for that afternoon. Officer Davis asked Mr. Scott if he had been drinking and Mr. Scott replied that he had not. Officer Davis also inquired about any medications that Mr. Scott was taking and Mr.

1. The officers’ interaction with Mr. Scott was captured by the patrol car’s video recording device. The dialogue has been transcribed and is part of the record.

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

Scott replied that he took blood pressure medication that morning as well as other medications related to a stroke he had suffered the previous spring. Officer Davis determined that “something” was affecting Mr. Scott’s ability to operate his vehicle and he informed Mr. Scott that he could not continue to drive. It is uncontested by the parties that Mr. Scott was physically unsteady at the time of the stop. One of the female officers commented: “Sir, we can’t let you drive. I mean, you can’t even stand here without wobbling”

Upon questioning Mr. Scott and discovering that there was no one in the Charlotte area whom Mr. Scott could contact, Officer Davis requested that Mr. Scott call his wife in Cary. Officer Davis noticed that Mr. Scott was having difficulty placing the call and promptly took Mr. Scott’s cell phone and asked him for his wife’s telephone number, which Mr. Scott relayed. Officer Davis then had a conversation with Anne Scott (“Mrs. Scott” or “plaintiff”); however, only Officer Davis’ side of the conversation was recorded by the patrol car camera. After informing Mrs. Scott of the situation regarding her husband, Officer Davis told the other officers that Mrs. Scott, a registered nurse, said that Mr. Scott “‘could relapse with a stroke and not realize it.’” Officer Davis told Mrs. Scott that, in his opinion, Mr. Scott’s speech was not slurred and that he did not appear to have any paralysis. Officer Davis allowed Mr. Scott to speak with his wife while he discussed the situation with the other two officers. The officers noted that Mr. Scott’s mouth was “drooped,” but they acknowledged that the condition could be attributed to his prior stroke. After some deliberation between the officers as to the best course of action, Officer Davis informed Mrs. Scott that she would have to drive to Charlotte from Cary to pick up Mr. Scott from a parking lot located near their present location. Officer Davis gave Mrs. Scott a telephone number to call when she arrived in Charlotte and he assured her that someone would bring Mr. Scott’s keys to her.

The video transcript reveals that one of the officers asked Mr. Scott if he needed medical assistance; however, no response is indicated. Mrs. Scott stated in her deposition that she did not specifically ask Officer Davis to call an ambulance or take Mr. Scott to a hospital. In his deposition, Officer Davis claimed that it was his belief that Mr. Scott was not having a stroke and that his symptoms were due to an adverse reaction to his medications.

Mr. Scott’s vehicle was subsequently moved to a “Pep Boys” parking lot and the officers left the scene. At approximately 11:30 a.m., emergency dispatch received a call that a man had collapsed in the

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

Pep Boys parking lot. Mr. Scott was located and transported by ambulance to Presbyterian Hospital, where he was pronounced dead the following day. A CT scan revealed that a brain hemorrhage was the cause of death.

On 17 October 2007, Anne Scott, individually and as administrator of her deceased husband's estate, filed a complaint in Mecklenburg County Superior Court against the City, the Charlotte Mecklenburg Police Department, Officer Davis, Officer Lingle, and Officer Conway in their official capacities. Plaintiff alleged, *inter alia*, that the various defendants had committed acts of negligence, gross negligence, and negligence per se. Plaintiff also brought a civil rights action pursuant to 42 U.S.C. § 1983. The City and Officers Davis, Lingle, and Conway, filed answers in which they pled the public duty doctrine as a defense to liability. On 3 April 2008, plaintiff voluntarily dismissed defendant Charlotte Mecklenburg Police Department. On 20 August 2008, plaintiff voluntarily dismissed Officers Davis, Lingle, and Conway. On 10 September 2008, the City filed a motion for summary judgment, claiming that there were no material issues of fact for jury consideration. On 2 January 2009, defendant filed a supplemental motion for summary judgment. A hearing was held on 12 January 2009 to address defendant's motion for summary judgment. On 30 January 2009, the trial court denied defendant's motion for summary judgment.

Interlocutory Nature of Appeal

An order denying a motion for summary judgment is interlocutory because it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). As a general rule this Court does not review interlocutory orders; "[h]owever, an appeal based on the public duty doctrine 'involves a substantial right warranting immediate appellate review.'" *Estate of McKendall v. Webster*, — N.C. App. —, —, 672 S.E.2d 768, 770 (2009) (quoting *Cockerham-Ellerbee v. Town of Jonesville*, 176 N.C. App. 372, 374, 626 S.E.2d 685, 687 (2006)). "The scope of our review in this case is . . . limited to issues that implicate the public duty doctrine." *Id.*

Standard of Review

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). We review a grant or denial of summary judgment *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). On appeal, this Court must determine: “‘(1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law.’” *McCoy v. Coker*, 174 N.C. App. 311, 313, 620 S.E.2d 691, 693 (2005) (quoting *NationsBank v. Parker*, 140 N.C. App. 106, 109, 535 S.E.2d 597, 599 (2000)). “For the case at bar, we must discern whether, upon review of the evidence in a light most favorable to plaintiff’s claims, judgment as a matter of law should have been entered in favor of defendant[] upon the assertion of the defense[] of the public duty doctrine” *Lassiter v. Cohn*, 168 N.C. App. 310, 315, 607 S.E.2d 688, 691, *disc. review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005).

Analysis

I. Application of the Public Duty Doctrine

The threshold question in this case is whether the public duty doctrine serves to bar plaintiff’s negligence claims in this specific circumstance, where plaintiff asserts that city police officers failed to summon medical assistance for an individual who appeared to be physically impaired in some respect, but did not request medical attention. Defendant argues that the public duty doctrine bars recovery in this case, and, therefore, summary judgment should have been entered in its favor. We agree with defendant and hold that the public duty doctrine shields defendant from liability under these specific circumstances.

In a claim for negligence, there must exist a “legal duty owed by a defendant to a plaintiff, and in the absence of any such duty owed the injured party by the defendant, there can be no liability.” *Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283 (internal citation omitted), *aff’d per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). “[W]hen the public duty doctrine applies, the government entity, as the defendant, owes no *legal* duty to the plaintiff.” *Blaylock v. N.C. Dep’t of Correction*, — N.C. App. —, —, 685 S.E.2d 140, 143 (2009).

In *Braswell v. Braswell*, 330 N.C. 363, 370-71, 410 S.E.2d 897, 907 (1991) (internal citation omitted), our Supreme Court adopted the common law public duty doctrine, stating:

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

In *Braswell*, a woman was killed by her estranged husband and her son, as administrator of his deceased mother's estate, filed suit against the county sheriff, alleging that the sheriff had negligently failed to protect the plaintiff's mother from foreseeable harm. *Id.* at 366, 410 S.E.2d at 899. The Supreme Court rejected the plaintiff's arguments and concluded that the public duty doctrine shielded the sheriff from liability. *Id.* at 371-72, 410 S.E.2d at 901-02.

Since *Braswell*, the application of the public duty doctrine in this State has been expanded and "interpreted to apply to public duties beyond those related to law enforcement protection." *Lassiter*, 168 N.C. App. at 316, 607 S.E.2d at 692; see *Moses v. Young*, 149 N.C. App. 613, 616, 561 S.E.2d 332, 334-35 (providing in depth analysis of case law since *Braswell*), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002). However, in *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999), the Supreme Court refused to apply the public duty doctrine to a negligence claim against the City of Charlotte where a crossing guard instructed a child to cross the street and the child was then hit by a vehicle. The Court distinguished the narrow duty held by a crossing guard to protect the children crossing the street from the general duty of a police officer to protect the public at large. *Id.* at 608, 517 S.E.2d at 126.

In *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000) (*Lovelace I*) our Supreme Court "sought to reign in the expansion of the public duty doctrine's application to other government agencies and ensure it would be applied in the future only to law enforcement agencies fulfilling their 'general duty to protect the public,' and thus reasserted the principles of *Braswell*." *Lassiter*, 168 N.C. App. at 317, 607 S.E.2d at 692 (quoting *Lovelace I*, 351 N.C. at 461, 526 S.E.2d at 654). In *Lovelace I*, a 911 operator delayed six minutes before dispatching firefighters to a house fire where a young girl ultimately died. 351 N.C. at 459-60, 526 S.E.2d at 653-54. The Supreme Court declined to expand the public duty doctrine in *Lovelace I*. *Id.* at 461, 526 S.E.2d at 654. After remand from the Supreme Court in *Lovelace I*, this Court held, on a subsequent appeal where plaintiff argued that

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

the 911 operator was actually a police officer serving as a 911 operator, that the public duty doctrine did not apply to shield the officer's negligence. *Lovelace v. City of Shelby*, 153 N.C. App. 378, 384-86, 570 S.E.2d 136, 141, *disc. review denied*, 356 N.C. 437, 572 S.E.2d 785 (2002) (*Lovelace II*). The Court reasoned:

Our Supreme Court has not seen the public duty doctrine as blanket protection for local municipalities carrying out all of the activities traditionally undertaken by them. The narrow scope of the public duty doctrine does not increase the burden on local law enforcement and city officials in that their duties are no greater than they have always been. The public duty doctrine is simply meant to provide protection to local law enforcement officials and the municipalities for which they work in a narrow set of circumstances.

Id. at 386, 570 S.E.2d at 141.

Plaintiff argues that *Braswell* and the holdings of *Lovelace I* and *II* stand for the proposition that the public duty doctrine applies only to situations where the police fail to protect a citizen from acts of a third party. We disagree. This Court in *Lassiter* soundly rejected that argument with regard to *criminal acts* of a third party, stating:

Braswell's rationale for the rule focused on the limited resources of local government, and necessarily the discretionary decisions as to how those resources must be deployed. However, we find implicit in *Braswell* and the public duty doctrine that an officer fulfilling his or her duty to provide police protection must employ some level of discretion as to what each particular situation requires, criminal or otherwise. Therefore, we do not read *Braswell* or *Lovelace* [] as immunizing discretionary decisions of law enforcement officers to *only* those occasions when responding to criminal offenders.

168 N.C. App. at 317, 607 S.E.2d at 692-93 (emphasis added). In *Lassiter*, this Court applied the public duty doctrine where a police officer who responded to a traffic accident did not call for back-up at the scene, reroute traffic with flares, or have the cars from the collision moved. *Id.* at 318, 607 S.E.2d at 693. As a result of the officer's discretionary acts, the plaintiff, who was standing beside his damaged car on the side of the road and speaking with the officer, was struck by an oncoming car. *Id.* at 313, 607 S.E.2d at 690. The Court reasoned, "[t]hough viewing the evidence in a light most favorable to plaintiff, we cannot ignore the discretionary demands of a police offi-

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

cer fulfilling her general duties owed when responding to the many and synergistic elements of a traffic accident. . . . Therefore, we hold that upon these limited facts, the public duty doctrine is applicable.” *Id.* at 318, 607 S.E.2d at 693. While *Lassiter* did involve acts of a third party, the Court did not base their holding on that fact; rather, the Court’s reasoning centered on the officer’s discretionary acts that indirectly led to plaintiff’s injury.

In *Little v. Atkinson*, 136 N.C. App. 430, 524 S.E.2d 378, *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000), this Court applied the public duty doctrine where police officers of the City of Gastonia failed to completely remove the remains of a victim from a crime scene and the victim’s family discovered bones and personal effects of the deceased. The Court held that the family’s gross negligence claim was barred by the public duty doctrine and that the conduct of the officers did not rise to the level of an intentional tort. *Id.* at 434, 524 S.E.2d at 381. In *Atkinson*, the Court did not take into consideration any acts of a third party.

Though our courts have both expounded upon and narrowed the application of the public duty doctrine since 1991, *Braswell* and its progeny have not wavered from the general principle that when a police officer, acting to protect the general public, indirectly causes harm to an individual, the municipality that employs him or her is protected from liability. This principle is grounded in the notion that an officer’s duty to protect the public requires the officer to make discretionary decisions on a regular basis, whether it be responding to an alleged threat by an abusive spouse or clearing the scene of a car accident.

Conversely, “[t]his Court has never applied the public duty doctrine when a police officer’s affirmative actions have directly caused harm to a plaintiff.” *Blaylock*, — N.C. App. at —, 685 S.E.2d at 144; *see Smith v. Jackson Cty. Bd. of Educ.*, 168 N.C. App. 452, 460, 608 S.E.2d 399, 406 (2005) (holding claim involved intentional conduct where plaintiff sued school resource officer for “interference with civil rights.”); *Moses*, 149 N.C. App. at 618, 561 S.E.2d at 335 (holding public duty doctrine inapplicable where officer accidentally struck motorcyclist with his police car while in pursuit of another motorcyclist as there was an absence of “‘discretionary governmental action’ ” (citation omitted)).

Here, plaintiff claims that the officers’ failure to summon medical assistance for Mr. Scott directly caused him harm as he went two

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

hours without medical attention that could have saved his life. We disagree and hold that the officers, while engaged in their duties to protect the general public, made discretionary decisions that indirectly caused harm to Mr. Scott. At the time the officers pulled Mr. Scott over, they were engaged in their general law enforcement duty to protect the public from an erratic driver who they believed could be intoxicated. Upon speaking with Mr. Scott, it was the officers' belief that he was not intoxicated, but was impaired in some respect and could no longer operate his vehicle. Based on the video transcript provided, it is clear that Mr. Scott was unstable when standing. The officers acknowledged that he had a slightly drooping mouth, though they recognized that the latter symptom could have been a result of his prior stroke. According to Officer Davis, Mr. Scott's speech was not slurred and he did not appear to have any paralysis. Officer Davis then called Mrs. Scott, a nurse, who stated that Mr. Scott " 'could relapse with a stroke and not realize it.' " Mrs. Scott spoke with her husband, and, in her deposition, she claimed that Mr. Scott was speaking in a "childlike" manner and that she informed Officer Davis of that fact. Mrs. Scott admitted in her deposition that she did not ask for an ambulance to be called, nor did she ask Officer Davis to take her husband to the hospital. She further stated that it was her understanding, based on her conversation with Officer Davis, that her husband had not requested medical attention. In the video transcript, a female officer, later identified as Officer Lingle, asked Mr. Scott: "Sir, do you feel like you need a medic to come look at you?" No response is transcribed; however, Officer Lingle testified in her deposition that Mr. Scott declined her request. Officer Davis testified that it was his ultimate conclusion that Mr. Scott was reacting to his medications and was not having a stroke.

Based on the video transcript and the officers' depositions, it is clear that the officers were aware that Mr. Scott was impaired and should not be allowed to drive. At that point the officers had to decide what was in the best interest of the general public and Mr. Scott. That decision was discretionary and was based on their personal observations at that time as well as their training as law enforcement officers. All three officers were in accord with the decision to leave Mr. Scott at the Pep Boys based on the circumstances. As a result of this discretionary decision, medical assistance for Mr. Scott was delayed—assistance which could have saved his life. Mr. Scott's death was, arguably, an indirect consequence of the officers' discretionary decision.

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

Plaintiff claims that law enforcement officers are trained in recognizing the symptoms of a stroke, and, if there is even a suspicion that an individual is having a stroke, based on the known symptoms, the officers lose all ability to use their discretion and *must* call for medical assistance. Plaintiff claims that failure to call for medical assistance is a breach of a legal duty. Under these circumstances, we disagree. “[I]t is placing this unreasonable hindsight based standard of liability upon a police officer when performing public duties which is exactly that which the public duty doctrine seeks to alleviate.” *Lassiter*, 168 N.C. App. at 318, 607 S.E.2d at 693.

Had Mr. Scott asked for medical assistance, the outcome of this case would likely be different. In that situation, the officers would not have had to weigh the facts and circumstances before them in order to ascertain whether Mr. Scott needed medical assistance as that question would have been answered for them. However, under the present facts, the officers had to make a discretionary decision as to whether medical assistance was needed where neither Mr. Scott or his wife asked for assistance, and, based on Officer Lingle’s testimony, Mr. Scott specifically declined medical assistance when asked if he needed it. Plaintiff claims that Mr. Scott was unable to make a reasoned decision at that time as to whether he needed medical assistance. Even if that assertion is true, it is based on the medical determination that Mr. Scott was, in fact, having a stroke—information that was not known to the officers at the time they were conversing with Mr. Scott. Plaintiff’s own expert, Dr. Paul McCauley (“Dr. McCauley”), was asked at his deposition: “Is there anything that you saw that indicated that David Scott was not competent to refuse EMS?” Dr. McCauley responded: “No.”

In sum, we hold that the public duty doctrine applies in this case where the police officers were providing police protection to the general public and made a discretionary decision that caused an indirect harm to Mr. Scott. Our holding in this case “recognizes the limited resources of law enforcement” *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Defendant argued before the Court, and we agree, that imposing a duty on law enforcement officers to call for medical assistance every time they believe a person *may* have a medical ailment, even where the person declines assistance, would be unreasonable and against the purpose of the public duty doctrine. As defendant argues, the City would likely be forced to implement policies requiring officers to abandon all discretion in similar situations and call for medical services. We decline to impose such a legal duty in this case.

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

II. Application of the Exceptions to the Public Duty Doctrine

Plaintiffs argue that, if the public duty doctrine is applicable, the two recognized exceptions apply.

There are two generally recognized exceptions to the public duty doctrine: (1) where there is a *special relationship* between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) when a municipality, through its police officers, creates a *special duty* by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.

Id. at 371, 410 S.E.2d at 902 (emphasis added) (citation and quotation marks omitted).

First, we must determine if a special relationship existed between the officers and Mr. Scott.

Those instances where our Courts have intimated that a special relationship exists relate to some affirmative step taken by the police. These steps either provide a *quid pro quo* with a state's witness or informant where a plaintiff would rely on an agreement with law enforcement, the basis of which most likely includes bargained for police protection in exchange for inculpatory testimony or information

Lassiter, 168 N.C. App. at 320, 607 S.E.2d at 694. Mr. Scott was not a state's witness or informant for purposes of the special relationship exception, nor was there any understood agreement or *quid pro quo*. We, therefore, hold that no special relationship existed in this situation.

Plaintiffs cite to *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 278, 626 S.E.2d 666 (2006), *aff'd as modified*, 361 N.C. 372, 646 S.E.2d 356 (2007), to support their argument that "[Mr.] Scott was particularly vulnerable and completely depend[en]t upon the police to get medical assistance[.]" therefore, they formed a special relationship with Mr. Scott. In *Multiple Claimants*, this Court held that the public duty doctrine did not apply where a jail inspector's failure to properly inspect a prison resulted in a fire that killed four inmates. *Id.* at 297, 626 S.E.2d at 678. Alternatively, the Court held that, even if the public duty doctrine applied, the special relationship exception also applied because the inmates were in the custody of the State. *Id.*

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

Multiple Claimants does not support plaintiff's argument that someone in a vulnerable state forms a special relationship with police officers who may assist them, nor have we found support for such a general proposition. *Multiple Claimants* is more appropriately related to plaintiff's argument that Mr. Scott was in police custody at the time of his arrest. "This Court has previously held that a 'special relationship' exists when the plaintiff is in police custody." *Id.* at 293, 626 S.E.2d at 676. (citing *Hull v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616 (1991)). Plaintiff claims that, though Mr. Scott was not arrested, he was in custody because the officers took his keys and left him in the Pep Boys parking lot.

An individual may be in custody if there is "a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997). "To determine whether a person is in custody, the test is whether a reasonable person in the suspect's position would feel free to leave." *Id.* Based on the interaction between Mr. Scott and the police officers, we find that Mr. Scott was never in police custody. Mr. Scott was pulled over on suspicion of driving while under the influence, but, upon brief inquiry, the officers determined that Mr. Scott was not intoxicated, but was not able to safely operate his vehicle. Mr. Scott's keys were taken so he could not attempt to drive, but the officers never ordered Mr. Scott to remain with his vehicle and he was free to leave that area at any time. A reasonable person in that situation would not feel that he or she was in police custody. Plaintiff's argument is without merit.

Plaintiff also claims that the special duty exception applies in this case. We disagree. Mr. Scott was told that he could not operate his vehicle and that his wife was coming to pick him up. The officers made no specific promises of police protection to Mr. Scott. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. In sum, the public duty doctrine is applicable in this case, and we find no exception that would result in imposition of liability under plaintiff's theories of negligence or gross negligence.

Plaintiff also brought a claim of negligence per se against the City, arguing that the officers violated N.C. Gen. Stat. § 122C-301 (2009) by failing to assist a person believed to be intoxicated. N.C. Gen. Stat. § 122C-301 states that "[a]n officer may assist an individual found intoxicated in a public place by[,] *inter alia*, taking the individual to his home, taking the individual to the home of another person "willing to accept him[,] or taking the individual to a medical facility if he is in need of medical care and cannot provide it for him-

SCOTT v. CITY OF CHARLOTTE

[203 N.C. App. 460 (2010)]

self. First, the statute lists multiple options that an officer “may” take. *Id.* The statute does not mandate that any action be taken, even if the individual is in need of medical care. *Id.* Moreover, this statute is inapplicable in this situation, in which the officers determined that Mr. Scott was not “intoxicated.” Even if the statute were applicable, “in the context of the public duty doctrine, our Supreme Court has held that, unless a statute prescribes a private right of action for its breach, the statute will not be interpreted as an exception to the general public duty doctrine.” *Lane v. City of Kinston*, 142 N.C. App. 622, 628, 544 S.E.2d 810, 815 (2001) (citing *Stone v. North Carolina Dep’t of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 716, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998)). *Lane* held that the public duty doctrine applied where a police officer encountered the plaintiff, an intoxicated man sitting on a bench, but refused to take the plaintiff to his brother’s house or call a taxi cab for the plaintiff. *Id.* at 623-27, 544 S.E.2d at 812-14. The plaintiff was later robbed, beaten, and thrown off a bridge. *Id.* at 623, 544 S.E.2d at 812. The Court further held that N.C. Gen. Stat. § 122C-301 does not impose an affirmative duty on police officers outside the scope of the public duty doctrine. *Id.* at 628-29, 544 S.E.2d at 815. Accordingly, we hold that the public duty doctrine applies to bar plaintiff’s negligence per se claim.

As stated *supra*, this appeal is interlocutory and we will not address issues that do not pertain to the public duty doctrine. Accordingly, we decline to address defendant’s assignment of error with regard to plaintiff’s 42 U.S.C. § 1983 claim.

Conclusion

Under the facts of this case, we hold that the public duty doctrine serves as a bar to plaintiff’s negligence claims, and, therefore, the trial court erred in denying defendant’s motion for summary judgment on that ground. We reverse and remand for further proceedings not inconsistent with this opinion.

Reverse and Remand.

Chief Judge MARTIN and Judge ERVIN concur.

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

IN RE: A.C.V.

No. COA09-1199

(Filed 20 April 2010)

1. Termination of Parental Rights— adjudication—findings of fact supported

The trial court's findings of fact supporting its conclusion of law that grounds existed to terminate respondent father's parental rights under N.C.G.S. § 7B-1111(a)(5) were supported by clear, cogent, and convincing evidence. Furthermore, nothing in respondent's version of the facts showed that respondent, a minor, or his family provided substantial financial support or consistent care to the mother during her pregnancy.

2. Termination of Parental Rights— jurisdiction—standing— licensed child-placing agency—father's consent not required

The trial court did not err in exercising subject matter jurisdiction over an action to terminate respondent father's parental rights because petitioner, a licensed child-placing agency to which the juvenile was surrendered by his mother, had standing to file a petition to terminate respondent's parental rights and respondent's consent was not required for the relinquishment.

3. Termination of Parental Rights— grounds—constitutionally protected status as a parent

The trial court did not err in concluding that a ground existed to terminate respondent father's parental rights under N.C.G.S. § 7B-1111(a)(5), and under *Owenby v. Young*, 357 N.C. 142 (2003), respondent's constitutionally protected status as the juvenile's natural parent was properly removed by the trial court.

Judge WYNN concurs in the result with separate concurring opinion.

Appeal by respondent-father from order entered 19 June 2009, *nunc pro tunc* 20 May 2009, by Judge Eric Craig Chasse in Wake County District Court. Heard in the Court of Appeals 22 February 2010.

Herring Mills & Kratt, PLLC, by Donna A. Hart and Bobby D. Mills, for petitioner-appellee.

Mercedes O. Chut for respondent-father appellant.

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

HUNTER, JR., Robert N., Judge.

The trial court terminated respondent-father's ("Joe's")¹ parental rights to A.C.V. ("Austin") on 20 May 2009 pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) (2009). Joe appeals and argues: (1) insufficient competent evidence was presented at trial to support certain findings of fact made by the trial court; (2) the trial court erred in exercising subject matter jurisdiction over the termination action; and (3) the trial court erred in concluding that a ground exists to terminate Joe's parental rights. We affirm the trial court's order.

Background

In 2007, Joe began dating Austin's mother ("Jan") when they were both sixteen and in high school. Joe and Jan confirmed that Jan was about three months pregnant in September 2007, and Joe and Jan's families met to discuss the situation shortly thereafter. During this meeting, Jan's father, "Roger," informed Joe that he needed to take care of Jan and the child. Roger recounted their conversation at trial:

[T]oward the end [of the meeting] I wanted to make sure [Joe]—we didn't have any problem with one another, and so I pulled my chair up right in front of his face. He was on the recliner and I pulled up on the recliner stool and got three inches from his face and made sure the interpreter—I said, "Make sure [Joe's] dad understands what I'm saying," and I looked at [Joe] and said, "You need to step up and do the right thing and take care of this baby and-and my daughter. You're going to have to get you a job, got to work, and do the right thing. If you don't, I'm gonna [sic] be mad. And you—and it starts from right now. She's got doctor's visits. She's going to have to pay the gas to get there. We've gotta [sic] pay the co-pay, so I need money," um, "It ain't got nothing to do—the baby's not here, but I need money now[.]

After this meeting, Joe and Jan continued to see each other at school, and dated through the fall of 2007. Jan's parents arranged for the couple to take parenting classes at the YMCA. In February 2008, Jan and her parents invited Joe to dinner, and they informed Joe that Jan would spend the duration of her pregnancy at a maternity home. Around Easter 2008, Jan decided to put Austin up for adoption, and Joe was informed of this decision on 1 April 2008. Austin was born on 14 April 2008.

1. Generic names are used throughout to protect the identity of the juvenile.

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

On 16 April 2008, petitioner, Amazing Grace Adoptions (“Amazing Grace”), a licensed private adoption agency, filed a petition to terminate Joe’s parental rights pursuant to N.C. Gen. Stat. § 7B-1103 (2009). Amazing Grace stated that Austin had been surrendered to Amazing Grace for adoption by Jan on 15 April 2008. Attached to the petition was an affidavit of parentage signed by Jan and identifying Joe as Austin’s father. Also attached was a “Relinquishment of Minor for Adoption by Parent or Guardian,” which was executed by Jan, as well as an acceptance of the relinquishment by Amazing Grace.

In the petition, Amazing Grace alleged that Jan had indicated the following:

[T]he birth father is 16 years of age; that he is the only one that she had sexual intercourse with in the summer of [omitted] when the child could have been conceived; that he is aware of the pregnancy; that she has not married the Respondent . . . ; that she has not received any financial support for the baby or consistent physical care for the baby from Respondent . . . , and has not received any legal notice that he has filed any actions to acknowledge paternity or otherwise legitimate the child. Upon information and belief he went with her to several pregnancy meetings at the local YMCA in the early stages of her pregnancy. Upon information and belief he is aware of the adoptive plan.

Amazing Grace averred in the petition that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(5) to terminate Joe’s parental rights, in that Joe had failed to provide adequate support to Jan during the pregnancy.

On 25 July 2008, Joe filed an answer to the petition. Joe admitted that he was aware of the pregnancy, he did not marry the mother, and he did not file any action or legal notice to legitimize the child. However, Joe stated in opposition to the petition that he “was never given the opportunity to care for the child despite [Joe] and his parents telling the mother and her parents that he was against adoption and wanted to care for his child.” Joe further stated that he “was unaware he could file legal documents legitimizing the baby.”

Hearings were held on the petition to terminate Joe’s parental rights on 24 April 2009 and 20 May 2009. The trial court concluded that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(5) to terminate Joe’s parental rights, because Joe had not provided support to Jan during the pregnancy and Joe had failed to satisfy the other requirements of section 7B-1111(a)(5). The court further concluded

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

that it was in Austin's best interests that Joe's parental rights be terminated. Joe appeals the trial court's order.

Analysis

I.

[1] Joe contends that many of the trial court's findings are not supported by competent evidence. We disagree.

This Court reviews the adjudicatory phase in a termination of parental rights case to determine "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). "So long as the findings of fact support a conclusion [that at least one ground in section 7B-1111(a) is satisfied], the order terminating parental rights must be affirmed." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 395 (1996). "If there is competent evidence to support the trial court's findings of fact and conclusions of law, the same are binding on appeal even in the presence of evidence to the contrary." *Id.* at 439, 473 S.E.2d at 397-98.

In its order, the trial court held that Amazing Grace satisfied the requirements of N.C.G.S. § 7B-1111(a)(5) in finding that a ground exists to terminate Joe's parental rights. This section of our General Statutes provides that parental rights may be terminated upon a finding that:

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:

- a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; . . . or
- b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or
- c. Legitimated the juvenile by marriage to the mother of the juvenile; or
- d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

N.C.G.S. § 7B-1111(a)(5). In this case, all of the findings in the trial court's order focus on subsection (d) of N.C.G.S. § 7B-1111(a)(5),

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

because Joe failed to satisfy the bright line requirements of subsections (a) through (c).

In contravention of many of the trial court's numerous findings now challenged, Joe contends that he provided to Austin, *in utero*, and Jan, during pregnancy, "substantial financial support or consistent care" by: (1) Joe's parents renting a larger home with sufficient room to house Austin when he was born; (2) saving money for the baby; (3) buying baby supplies, including "a stroller, crib, playpen, toys, clothing and washtub"; (4) having some social contact, including phone calls with Jan through the pregnancy; (5) attending one ultrasound appointment; and (6) attending four or five YWCA parent-ing classes after he was made aware that Jan was going to the classes.

Joe testified that when he informed Jan that he had some items for the baby, Jan told him that she already had a plentiful amount of similar items. Joe kept the items at home as a result. Joe also claims that Roger inhibited his ability to provide more support to Jan by withholding contact information from Joe when Jan left to reside at the maternity home for the remainder of the pregnancy. Roger contradicted Joe's testimony at trial, and stated instead that he had, in fact, helped Jan place Joe's name on the approved visitors' list and had offered to give Joe Jan's contact information at the maternity home. Joe did not reach Roger for that information until just prior to Austin's birth. Roger also testified that, from his perspective, Joe was not actively involved in helping with the pregnancy, despite his own efforts to include Joe in the process.

Joe presents his version of the facts on appeal in an effort to challenge 89 of the trial court's 123 findings of fact as to whether he provided "substantial financial support or consistent care" during Jan's pregnancy under section 7B-1111(a)(5). Joe contends that when evidence favorable to him is compared to the trial court's findings, it is apparent that each finding is not supported by adequate competent evidence in the record. We need not address each challenged finding individually, however, because the evidence offered by Joe shows that no direct support was given to Jan or the baby during the pregnancy.

We note that the terms "substantial financial support" and "consistent care" are not defined within Chapter 7B of our General Statutes. However, in this case, we think it is reasonable to conclude that such language in the statute requires, at a minimum, that Joe should have involved himself to the extent Roger requested at the

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

families' meeting in the fall of 2007: gas money, doctor co-pay reimbursement, and general financial support during Jan's pregnancy. Nothing in Joe's version of the facts shows that either he, or his family,² provided this sort of financial support directly to Jan and Austin during gestation.

These facts are analogous to those presented in *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 630 S.E.2d 673 (2006). In *A Child's Hope*, this Court reversed an order finding that A Child's Hope, LLC, an adoption agency, had failed to show that it satisfied its burden under section 7B-1111(a)(5); even though the facts tended to show that the putative father did not discover the existence of his biological status as the child's father until after the birth of the child. *A Child's Hope*, 178 N.C. App. at 105, 630 S.E.2d at 678. The putative father's knowledge was delayed due to the biological mother informing the putative father that she had miscarried instead of delivering the child. *Id.* This Court reversed the order keeping intact the putative father's parental rights, because, even though the putative father was entirely unaware of his child's existence until he was served with a summons to terminate his rights, the father did not legitimate or support the mother or child in accordance with section 7B-1111(a)(5). *Id.* at 105-06, 630 S.E.2d at 678-79. In so holding, a majority of this Court wrote that section 7B-1111(a)(5) "is explicit in its requirements and there was no evidence that respondent met those requirements." *Id.* at 105, 630 S.E.2d at 678.

Here, unlike *A Child's Hope*, Joe was aware that Jan was pregnant, and should have been aware that Jan needed more "care" than a few phone calls, more baby clothes, or attendance at a few classes or one ultrasound. The word "consistent" means with "regularity, or steady continuity throughout: showing no significant change, unevenness, or contradiction." *Webster's Third New International Dictionary Unabridged* 484 (1976). Thus, even viewing Joe's facts in a light most favorable to him, the strict statutory requirements of section 7B-1111(a)(5), as we have interpreted in *A Child's Hope*, have not been met.

Because Joe's presentation of the facts fail to satisfy the requirements of our statute, we conclude that Finding of Fact 107 providing that Joe failed to meet the requirements of section 7B-1111(a)(5) is

2. See N.C. Gen. Stat. § 50-13.4(b) (2009) ("[P]arents of a minor, unemancipated child who is the custodial or noncustodial parent of a child shall share this primary liability for their grandchild's support with the minor parent, the court determining the proper share, until the minor parent reaches the age of 18 or becomes emancipated.").

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

supported by clear, cogent, and convincing evidence. These assignments of error are overruled.

II.

[2] Next, Joe argues that Amazing Grace lacked standing to file the petition to terminate his parental rights, and contends that Jan's relinquishment alone was insufficient to confer standing upon Amazing Grace. Joe claims that pursuant to N.C. Gen. Stat. § 48-3-601 (2009) and 48-3-701 (2009), his consent to adoption was necessary in order to confer standing. We disagree.

"Standing is jurisdictional in nature and '[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.'" *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (citation omitted). In North Carolina, standing to file a petition to terminate parental rights is prescribed by N.C. Gen. Stat. § 7B-1103, which provides that any "licensed child-placing agency to which the juvenile has been surrendered for adoption *by one of the parents* or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701" has standing to file a petition to terminate parental rights. N.C. Gen. Stat. § 7B-1103(a)(4) (emphasis added). Section 48-3-701(b) provides that "[t]he mother of a minor child may execute a relinquishment at any time after the child is born but not sooner. A man whose consent is required under G.S. 48-3-601 may execute a relinquishment either before or after the child is born." N.C.G.S. § 48-3-701(b). In accordance with N.C. Gen. Stat. § 48-3-601, "a man must before the earlier of the filing of the adoption petition or the date of the hearing provide reasonable and consistent payments for the support of (1) the biological mother during her pregnancy, (2) the minor, or (3) both the biological mother and the minor." *In re Adoption of Byrd*, 137 N.C. App. 623, 631, 529 S.E.2d 465, 471 (2000) (citing N.C. Gen. Stat. § 48-3-601(b)(4)(II)), *aff'd*, 354 N.C. 188, 552 S.E.2d 142 (2001).

Joe argues that the trial court erred in failing to determine whether his consent to adoption was required under N.C. Gen. Stat. § 48-3-601. Joe contends that if his consent was needed, then Jan's relinquishment alone was insufficient to confer standing upon Amazing Grace. Regarding the requirements, Joe argues that because no adoption petition had been filed at the time of the termination hearing, consideration of whether he had supported the mother and child was premature. Joe further asserts that, because he complied with the statutory requirements of acknowledgment of

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

paternity and communication with the mother, his consent to adoption was required.

Despite Joe's contentions, N.C.G.S. §§ 48-3-601 and -701 create no further burden on Amazing Grace, other than a timely relinquishment by a parent or guardian, in order to establish standing. Section 48-3-601 solely concerns the circumstances under which a person's consent to adoption is required. Section 48-3-701 solely concerns the timing of a relinquishment by a parent or guardian. Here, Jan executed a timely relinquishment in accordance with N.C.G.S. § 48-3-701. Accordingly, we conclude Jan's timely relinquishment was sufficient to confer standing upon Amazing Grace.

Joe further asserts that, even assuming *arguendo* that his consent was not required, Amazing Grace lacked standing because it never introduced Jan's relinquishment into evidence. We find Joe's contention to be without merit. In order to confer jurisdiction on the trial court, a juvenile petition must state "[t]he name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by [N.C. Gen. Stat. §] 7B-1103 to file a petition or motion." N.C. Gen. Stat. § 7B-1104(2) (2009). Here, Amazing Grace alleged that Jan had surrendered the child to Amazing Grace, and a notarized copy of the relinquishment was attached to the petition. Thus, we conclude Amazing Grace alleged sufficient facts to establish its standing.

III.

[3] We next consider Joe's argument that the trial court erred by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) to terminate his parental rights.

At the outset, we note that we have already concluded that the trial court's finding that Joe failed to comply with section 7B-1111(a)(5) is supported by clear, cogent, and convincing evidence. Since this finding unquestioningly supports the trial court's conclusion that a ground exists to terminate Joe's parental rights under our statutes, the trial court's conclusion of law to this effect must be affirmed under our standard of review. *In re Shermer*, 156 N.C. App. at 285, 576 S.E.2d at 406; *In re Oghenekevebe*, 123 N.C. App. at 435-36, 473 S.E.2d at 395. Therefore, Joe's contention that he could not comply with section 7B-1111(a)(5) due to his status as a minor need not be addressed, because our prior discussion of the trial court's findings demonstrates that either Joe or his family could have provided at

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

least some direct support to Jan, and the record is devoid of any evidence showing that this occurred.

However, Joe also argues that the trial court erred in failing to find that Joe is unfit to be a parent or that Joe has neglected Austin. In citing *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972), Joe claims that absent these findings, his rights have been terminated without sufficient due process.

Protection of the family unit is an absolute right guaranteed by the Due Process and Equal Protection clauses of the Fourteenth Amendment and the Ninth Amendment of the United States Constitution. *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 266 (2003) (citing *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972)). Courts in this State have long held that this right will remain undisturbed “absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children[.]” *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). “Th[is] protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.” *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266. However, this presumption is erased where a parent “fails to shoulder the responsibilities that are attendant to rearing a child.” *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

In *Owenby*, the North Carolina Supreme Court noted that a finding under any of the provisions in section 7B-1111 will result in a parent “forfeit[ing] his or her constitutionally protected status.” *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267. When the protection of the parental presumption is lost, the trial court may then ask the lower threshold question of what is the “best interest of the child.” *Id.* at 146, 579 S.E.2d at 267.

Cases such as this and *A Child's Hope* demonstrate what appears to be an underlying tension between the constitutional rights of putative fathers and the requisites of section 7B-1111(a)(5) as this State's appellate courts have interpreted it. Indeed, with respect to its application of section 7B-1111(a)(5), the trial court here accurately noted:

[O]ur appellate courts have interpreted Chapter §7B harshly. And I am compelled to follow their decisions by my oath and until the law is changed[.] [I]t is highly unlikely that any putative father can take some of the steps in §1111(a)(5) prior to the filing of a Petition for the Termination of his Parental Rights.

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

In summarizing its impression of Joe, the trial court further stated:

[T]his courtroom, on most days of the week, has parents who are not half the parent that you [Joe] are and the irony is that—that you’re a child. . . . I think you always wanted to be part of your son’s life. I agree about the housing, [and] the supplies [and] that you have sent some money.

These statements by the trial court concerning Joe and Chapter 7B aside, we believe that *Owenby* controls Joe’s due process argument, and we are thus bound by precedent to acknowledge that Joe’s constitutionally protected status as Austin’s natural parent was properly removed by the trial court. Therefore, the trial court’s application of the best interests test was appropriate.

However, we observe that one of the purposes of Chapter 7B, as provided in section 7B-100, is “[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and *parents*[.]” N.C. Gen. Stat. § 7B-100(1) (2009) (emphasis added). It is difficult, under the circumstances of this case, to conclude that Joe’s constitutional rights were assured³ through the application of section 7B-1111(a)(5)—particularly in light of the procedures mandated for minors in cases of abused, neglected, or dependent children pursuant to N.C. Gen. Stat. §§ 7B-401, -503 (2009).

Under these procedures, if a request for nonsecure custody is made, a far less permanent placement than adoption, the trial court is first *required* to consider the release of a child to the “juvenile’s parent, relative, guardian, custodian, or other responsible adult.” N.C. Gen. Stat. § 7B-503(a) (2009). The adoption procedures used here under Chapter 48, as reflected in the outcome of this case and *A Child’s Hope*, has no similar mechanism for assuring that the constitutional protections guaranteed to a putative father are protected.

Of the 123 findings made by the trial court in its order terminating Joe’s rights, not one claims that Joe was unfit to be a parent or that Joe’s family’s home was unsuitable to house a child. Austin was

3. We recognize that the trial court could have concluded that, even though a ground existed to terminate Joe’s parental rights, the bond between a biological father and son was in the best interests of Austin in this case rather than leaving Austin with the adoptive parents. The trial court did not so conclude, and so our constitutional concerns with respect to section 7B-1111(a)(5) rest purely on whether Joe’s protected status was properly removed, and not whether the trial court properly weighed that Austin’s best interests were served by placement with the adoptive family.

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

born, given to an adoptive family the next day, and left with the adoptive family for over a year prior to the termination of parental rights hearing in this case. As a practical matter, a litigant in Joe's position is never offered the opportunity to raise his or her own child through this application of Chapter 48. Furthermore, temporarily placing a child with an adoptive family before the father has been able to demonstrate that he is capable of maintaining a familial relationship appears to provide unequal treatment to a father of a newborn as opposed to the father of an abused, neglected, and dependent child. Nevertheless, based on *Owenby* and *A Child's Hope*, these assignments of error are overruled.

Affirmed.

Judge BEASLEY concurs.

Judge WYNN concurs in the result with separate concurring opinion.

WYNN, Judge, concurring in result.

The majority opinion notes that “[i]t is difficult, under the circumstances of this case, to conclude that [the Respondent-father’s] constitutional rights were assured through the application of section 7B-1111(a)(5).” I write separately to point out that we do not reach the constitutional issue because, under North Carolina law, the biological father in this case did not demonstrate his entitlement to the constitutionally protected status of a parent.

It is well settled that “the protection of the family unit is guaranteed not only by the Due Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment.” *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 266 (2003) (citing *Stanley v. Illinois*, 405 U.S. 645, 661, 31 L. Ed. 2d 551, 559 (1972)). Our Supreme Court has held that “absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.” *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994).

The Respondent-father in this case argues that his parental rights were terminated without sufficient evidence of unfitness or neglect. However, as the majority states, our Supreme Court’s holding in

IN RE A.C.V.

[203 N.C. App. 473 (2010)]

Owenby stands for the principle “that a finding under any of the provisions in section 7B-1111 will result in a parent ‘forfeit[ing] his or her constitutionally protected status.’” (quoting *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267).

In this case, there is no issue as to whether the Respondent-father is in fact the biological father of the child. Indeed, the trial court found that “[p]aternity testing confirmed that [Respondent-father] is the father of the child that is the subject of this action.” However, we have previously explained that “a father’s constitutional right to due process of law does not ‘spring full-blown from the biological connection between parent and child’ but instead arises only where the father demonstrates a commitment to the responsibilities of parenthood.” *In re Dixon*, 112 N.C. App. 248, 251, 435 S.E.2d 352, 354 (1993) (quoting *Lehr v. Robertson*, 463 U.S. 248, 260, 77 L. Ed. 2d 614, 626 (1983)).

“Section 7B-1111 of our statutes, which establishes grounds for terminating parental rights, is used to determine a putative father’s commitment to his child.” *In re Williams*, 149 N.C. App. 951, 958, 563 S.E.2d 202, 206 (2002). It follows that if the father does not meet the requirements of the statute, he is not entitled to the *Petersen* presumption. *See Dixon*, 112 N.C. App. at 251, 435 S.E.2d at 353-54. The trial court concluded that the Respondent-father had not satisfied the requirements of N.C. Gen. Stat. § 7B-1111(a)(5) in that he only offered—and did not actually provide—financial support.

With due regard for the harshness of this result, I agree that it follows our case law. *See Child’s Hope, LLC v. Doe*, 178 N.C. App. 96, 103, 630 S.E.2d 673, 677 (2006) (noting “similarity of the requirements between the statute permitting the termination of a putative father’s rights and the statute requiring the consent of a father of a child born out of wedlock to its adoption”); *see also In re Adoption of Anderson*, 360 N.C. 271, 279, 624 S.E.2d 626, 630 (2006) (“So long as the father makes reasonable and consistent payments for the support of mother or child [as to a savings account or trust fund], the mother’s refusal to accept assistance cannot defeat his paternal interest.”). I therefore concur in the result.

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

STATE OF NORTH CAROLINA v. JESUS ESPINOZA-VALENZUELA

No. COA09-661

(Filed 20 April 2010)

1. Evidence— prior crimes or bad acts—violence against victims’ mother—mother victim of sexual abuse—not plain error

The trial court did not commit plain error in a sexual offenses case by admitting into evidence testimony regarding defendant’s violence against the mother of the two victims and testimony that the victims’ mother had been a victim of sexual abuse as a child. The evidence was relevant and probative of issues in the case and even if the evidence was erroneously admitted, defendant failed to show that the jury would have reached a different result absent the error.

2. Appeal and Error— preservation of issues—failure to object at trial

Defendant’s argument that the trial court erred in a sexual offenses case by allowing a doctor to testify that she recommended “trauma focus cognitive behavior therapy” for both child victims was overruled as defendant did not raise a proper objection at trial.

3. Sexual Offenses— sufficient evidence—motion to dismiss properly denied

The trial court did not err in denying defendant’s motion to dismiss charges of first-degree statutory rape, first-degree statutory sexual offense, and taking indecent liberties with two minors as the evidence, viewed in the light most favorable to the State, was sufficient to support the charges.

4. Sentencing— motion for appropriate relief granted—no prejudicial error

Defendant’s argument that the trial court did not have jurisdiction to grant defendant’s motion for appropriate relief and reduce defendant’s overall sentence in a sexual offenses case was overruled as defendant was not prejudiced by the granting of relief which he sought.

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

5. Sentencing—consecutive sentences—not grossly disproportionate

Defendant's original sentence of 57.5 to 71.25 years in prison for convictions of multiple sexual offenses, and his reduced sentence of 40 to 49.5 years in prison resulting from the trial court's granting of his motion for appropriate relief, did not violate the Eighth Amendment to the United States Constitution. Defendant failed to show that the trial court abused its discretion either in imposing three consecutive sentences within the presumptive range originally, or in reducing the overall time that defendant would serve for two consecutive sentences within the presumptive range.

Appeal by defendant Jesus Espinoza-Valenzuela from judgments entered 16 April 2009 by Judge A. Leon Stanback, Jr., in Wake County Superior Court. Heard in the Court of Appeals 4 November 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

Daniel F. Read for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Jesus Espinoza-Valenzuela ("defendant") appeals his convictions of first-degree sex offense with a child, attempted first-degree rape, and two separate counts of indecent liberties with a child. On appeal, defendant argues that the trial court committed plain error by allowing witnesses to testify regarding allegedly irrelevant evidence of defendant's prior domestic abuse of his long-term girlfriend, the victims' mother, and by allowing the admission of evidence that the victims' mother had also been a victim of sexual abuse as a child. Defendant also asserts that the trial court erred by denying his motion to dismiss the charges at the close of the evidence, and that the sentencing judge did not have jurisdiction to grant defendant's motion for appropriate relief after defendant had given notice of appeal. Finally, defendant contends that his original sentence and the reduced sentence pursuant to his motion for appropriate relief violate the Eighth Amendment of the United States Constitution. After review, we conclude the following: (1) defendant received a trial free of prejudicial error as the evidence admitted during trial was clearly relevant and not unduly prejudicial to defendant, given the overwhelming evidence against defendant which was also presented to

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

the jury; (2) the trial court properly denied defendant's motions to dismiss; (3) the trial court had jurisdiction and properly granted defendant's motion for appropriate relief given that defendant addressed his motion to the trial judge after filing notice of appeal; and (4) defendant's sentence falls within the presumptive range of the sentencing guideline, and thus it does not violate defendant's Eighth Amendment rights.

I. FACTUAL BACKGROUND

In December of 2007, defendant was arrested for sexually abusing MGv and YGV, the daughters of his long-time girlfriend, Victoria Mariano. On 28 January 2008, a grand jury indicted defendant on charges of (1) first-degree sexual offense, (2) first-degree statutory rape, (3) two counts of indecent liberties with YGV, (4) first-degree statutory rape, (5) one count of indecent liberties with MGv, and (6) first-degree statutory sex offense with MGv. Defendant pled not guilty to all charges and was tried before a jury on 2-6 February 2009.

At trial, the State's evidence showed the following: Victoria Mariano and defendant were involved in a romantic relationship, but were never legally married. Defendant and Victoria had a contentious relationship and fought frequently. The couple have two children together; however, Victoria has three children of her own, including MGv, born in 1996, and YGV, born in 1997. Defendant also has a wife and children in Mexico.

Defendant moved into Victoria's house in 1999 when MGv was only three years old. MGv could not remember exactly, but when she was seven or eight years old, defendant began to go into her room and touch her vagina and breasts and make her lick his penis. This happened on several occasions, but MGv could not recall how many times. MGv told her mom that defendant had been touching her and putting his penis in her vagina, but he denied it. Defendant told MGv that if she told anybody he would kill her and her mom. MGv was scared to tell anyone because defendant frequently beat her mother when he was drunk.

Beginning around a year or a year and a half before defendant's arrest, he also began sexually abusing YGV. On one specific occasion, defendant pushed her down on the bed, covered her mouth and tried to forcibly insert his penis in her vagina. She resisted him and defendant failed to fully insert his penis. He also touched her breasts, and made her put her hands on his penis.

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

When YGV told MGv that defendant had been touching her too, they both told their mother about defendant's actions. Defendant denied touching either girl. Victoria called the police to report the allegations. There is some confusion regarding the length of time that passed between the moment that YGV and MGv confided in their mother and when Victoria initiated the call to the police.

On 8 December 2007, Officer Corinne McCall was dispatched to Victoria's residence at about 5:30 p.m. Officer McCall interviewed MGv first and asked the girl if defendant hurt her. She responded, "Yes," whereupon the officer contacted a Department of Social Services ("DSS") caseworker because the matter involved children who had been victims of abuse. Officer McCall then transported YGV, MGv, and Victoria to WakeMed Hospital.

Dr. St. Claire oversaw the medical examination of MGv and YGV. The examination showed that MGv had some findings on her genital exam but they were non-specific. Dr. St. Claire's examination of YGV's genital exam was normal, consistent with the exams at the emergency room. Dr. St. Claire determined that this was not unusual even in children who have had sexual contact. At trial, over objection, Dr. St. Claire was allowed to testify that she recommended that both girls receive trauma focus cognitive behavior therapy for children who have experienced childhood trauma.

Scott Snider, an employee at the Duke Child Abuse and Neglect Medical Evaluation Clinic, conducted the diagnostic interviews for YGV and MGv. Both children were referred to Mr. Snider by Wake County DSS after indicating concern for possible sexual abuse of both children by defendant. Mr. Snider interviewed YGV on 14 December 2007 and MGv on 21 December 2007, at which point he concluded that both victims could tell the difference between the truth and a lie.

Cindy Frye, a licensed clinical social worker employed as a therapist at Wake County Human Services, began working with YGV and MGv in early April 2008. They both received treatment from Ms. Frye once a week. Ms. Frye helped the children create a narrative of what happened by creating a book of memories that they recalled happening.

Dr. Donna Moro-Sutherland, a doctor in the pediatric emergency room at WakeMed, testified that YGV and MGv were first seen at the WakeMed Emergency Room at about 11:00 p.m. on 8 December 2007.

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

Dr. Moro-Sutherland first talked to YGV. YGV told the doctor she was there because defendant had put his penis in her private area, put his penis in her mouth, and made her lick his penis. The doctor testified that MGv's hymen had a thin rim with a defect, a skin tag at 9 o'clock, and an anal skin tag at 6 o'clock; however, these findings were indeterminate as to cause. Urinalysis revealed YGV had a urinary tract infection for which she was prescribed an antibiotic. According to the doctor, specific findings for sexual assault are difficult to identify with children because they heal so quickly. It was her opinion that if the abuse happened several years before, it is not surprising that there would be no specific findings of sexual assault.

Katie Treadway, an employee for the Child Protective Services Division of Wake County Human Services, was assigned the file on the two victims on 10 December 2007. Ms. Treadway scheduled a child medical evaluation and a home visit with Victoria on 11 December 2007. During the home visit Victoria was very upset and emotional.

Defendant testified that he lived with Victoria for about eight years, but had a wife in Mexico. While testifying, defendant stated that in 2007, when he was preparing to go to Mexico to see his wife and children, Victoria threatened to "cut off his penis" if he tried to leave. He also testified that Victoria said that she would rather see him dead or in jail, and that if defendant was not going to be with her, he was not going to be with anyone else. Defendant denied improperly touching either MGv or YGV.

After the conclusion of all of the evidence, the jury convicted defendant of (1) first-degree statutory sex offense with YGV, (2) attempted first-degree statutory rape of YGV, (3) two counts of indecent liberties with YGV, (4) first-degree statutory rape of MGv, and (5) indecent liberties with MGv. Defendant was sentenced to three consecutive sentences of 230 months' to 285 months' imprisonment (credited 425 days) and was ordered to enroll in satellite-based monitoring for life.

On 6 February 2009, defendant gave notice of appeal as of right pursuant to N.C. Gen. Stat. § 15A-1444 (2009) in open court. On 24 February 2009, defendant filed a motion for appropriate relief seeking resentencing based on his contention that the sentence was not supported by the evidence presented at the trial and sentence hearing. On 16 April 2009, pursuant to defendant's motion for appropriate relief, Judge A. Leon Stanback, Jr., conducted a resentencing

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

hearing and modified defendant's sentence to a presumptive term of two consecutive sentences of 240 to 297 months' imprisonment (plus monitoring).

On appeal, defendant contends that the trial court erred by (1) allowing witnesses to testify regarding defendant's violence against Victoria, and by allowing Katie Treadway to testify that she had been a victim of sexual abuse as a child; (2) allowing Dr. St. Claire to testify regarding the victims' treatment; (3) improperly denying defendant's motion to dismiss; (4) improperly granting defendant's motion for appropriate relief based on his contention that the sentencing court did not have jurisdiction to grant such a motion while the appeal was pending; and (5) committing a constitutional error of cruel and unusual punishment by sentencing defendant to a sentence of 690 to 855 months' imprisonment, later modified to 480 to 594 months' imprisonment.

**II. TESTIMONY REGARDING DEFENDANT'S VIOLENCE
TOWARD VICTORIA AND VICTORIA'S PAST AS A CHILD
SEXUAL ABUSE VICTIM**

[1] Defendant contends that the trial court committed plain error by (1) admitting evidence that defendant struck Victoria, the victims' mother, in the victims' presence; and (2) allowing Katie Treadway, an employee of Child Protective Services, to testify that the victim's mother had been a victim of abuse. Defendant avers that this evidence is irrelevant, unduly prejudicial, and served to inflame the jury against him. We disagree.

A. Standard of Review & Applicable Rule of Law

Initially, we note that defendant did not raise an objection at trial to (1) the testimony of any witness regarding the victims' statements about defendant hitting Victoria in their presence or (2) Ms. Treadway's testimony that Victoria had been a child victim of sexual abuse. Where no objection is raised, defendant must establish "plain error," if any, in the admission of the testimony. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "[P]lain error, . . . is error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (citation omitted). The "plain error" rule is applicable to questions involving the admissibility of evidence. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806-07 (1983).

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

Pursuant to Rule 401 of the North Carolina Rules of Evidence, relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2009). Ordinarily, any evidence tending to support a theory of the case being tried is admissible as relevant unless the only probative value of such evidence is to show that the defendant has the propensity to commit an offense of the nature of the crime charged. *State v. Coffey*, 326 N.C. 268, 278-80, 389 S.E.2d 48, 54-55 (1990).

If the evidence tends to prove some relevant fact, it may be shown by competent evidence unless the probative value is outweighed by the prejudicial effect or the act is too remote to have substantial probative value. *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988). However, evidence that is probative in the State’s case necessarily will have some prejudicial effect on the defendant. *State v. Mercer*, 317 N.C. 87, 93, 343 S.E.2d 885, 890 (1986).

B. Defendant’s Violence Toward Victoria

First, defendant contends that the trial court committed plain error by admitting evidence that defendant had struck the victims’ mother in the victims’ presence. We conclude that, because the evidence was relevant and probative of the victims’ motivation not to immediately report crimes involving her family members and defendant, the trial court did not commit plain error.

Pursuant to the standard of review and the applicable rule of law, the testimony which tended to show that defendant beat the victims’ mother on various occasions was not automatically inadmissible, even though it also tended to show defendant’s character. In fact, such evidence was relevant to show why both girls were afraid to report defendant’s sexual abuse. This evidence was also relevant to refute defendant’s assertion that Victoria was pushing the children to make these allegations to get defendant arrested and out of the house.

Additionally, under the plain error standard, defendant failed to show that a “reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]” N.C. Gen. Stat. § 15A-1443(a) (2009); *see State v. Keys*, 87 N.C. App. 349, 361 S.E.2d 286 (1987). In this case, the jury was presented with the following evidence: (1) testimony of MGv that defendant raped her, forced her to perform fellatio on him, and touched her

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

breasts and vagina; (2) testimony of YGV that defendant attempted to rape her but did not penetrate her vagina, forced her to perform fellatio on him, and touched her breasts and vagina; (3) testimony of Victoria that the girls reported defendant's abuse to her; (4) testimony of Dr. Moro-Sutherland, the expert in pediatric emergency medicine; (5) testimony of a police officer and a social worker; and (6) testimony of both Dr. St. Claire and Dr. Moro-Sutherland, experts in pediatric medicine, that it would be uncommon to have specific physical findings of penetration in children.

The State presented overwhelming evidence against defendant to the jury, and on appeal defendant has failed to show any fundamental error that resulted in a miscarriage of justice and which probably resulted in the jury reaching a different verdict than it otherwise would have reached merely because certain witnesses were allowed to mention defendant's violence against the victims' mother. *See State v. Stancil*, 146 N.C. App. 234, 240, 552 S.E.2d 212, 215-16 (2001), *modified and aff'd per curiam*, 355 N.C. 266, 559 S.E.2d 788 (2002).

In light of the overwhelming direct and circumstantial evidence of defendant's guilt, any error which could have resulted from the trial court's allowing testimony concerning the domestic violence between defendant and Victoria was harmless error. *See State v. Gordon*, 104 N.C. App. 455, 459, 410 S.E.2d 4, 7, *disc. review denied*, 330 N.C. 443, 412 S.E.2d 78 (1991). Accordingly, we overrule this assignment of error, and hold that the trial court did not commit plain error.

C. Victoria's Childhood Sexual Abuse

Defendant next argues that the trial court committed plain error by allowing Katie Treadway, an employee of Child Protective Services, to testify that the victim's mother had been a victim of sexual abuse as a child. As discussed previously, defendant did not object at the time this evidence was offered; therefore, we examine defendant's argument under the plain error standard. With regard to his argument, defendant specifically contends that informing the jury that the victims' mother had also been a victim of sexual abuse creates sympathy for the mother, resulting in unfair prejudice to defendant by exciting the jury's emotions.

Here, the trial court did not commit plain error by allowing Ms. Treadway's testimony, because contrary to defendant's contention, the information that Victoria had been a sexual abuse victim was relevant to the question of why she hesitated to contact authorities in

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

the face of information from MGv that defendant was sexually molesting both MGv and YGv. As Ms. Treadway explained, “often times when you have one parent who has been abused and then their children become abused, those emotions from their past abuse come into play with how they react.” Based on her experience in investigating abuse and neglect of children, Ms. Treadway was in a better position than the jurors to understand the emotions that would have prevented Victoria from reporting defendant’s abuse to authorities.

Ms. Treadway’s statement concerning the possible emotions that Victoria felt as a child victim of sexual abuse was relevant to (1) explain why Victoria delayed notifying authorities of YGv’s and MGv’s claims of sexual abuse and (2) rebut defendant’s assertion that the girls were lying because their mom did not immediately report the abuse. As such, we hold that the trial court’s failure to *sua sponte* strike Ms. Treadway’s testimony from the jury’s consideration was not plain error. This assignment of error is overruled. *See State v. Alston*, 131 N.C. App. 514, 517-18, 508 S.E.2d 315, 318 (1998).

III. DR. ST. CLAIRE’S TESTIMONY REGARDING THE VICTIMS’ MEDICAL TREATMENT

[2] Defendant contends that the trial court erred when it overruled his objection to Dr. St. Claire’s testimony that her medical recommendations for both victims included “trauma focus cognitive behavior therapy.” Defendant asserts that allowing this testimony was error because it served to bolster the credibility of the victims.

Initially, we note that defendant did not make the proper objection at trial, and as such, did not give the trial court the opportunity to rule on the objection he now raises. Defendant did not object to Dr. St. Claire’s qualifications at the time she was tendered and accepted by the trial court as an expert in pediatric medicine and child abuse and neglect. In fact, at trial defendant’s counsel argued to the court that admission of Dr. St. Claire’s testimony was cumulative of prior testimony and might confuse the jury because “they can infer that the doctor’s [conclusion was that] in her opinion it was sexual abuse.” In response to this argument the trial court determined that the probative value was not outweighed by any prejudicial effect.

As defendant did not raise a proper objection at trial and does not argue plain error on appeal, this assignment of error is overruled. N.C. R. App. P. 10(b)(1) (2009); *see In re K.D.*, 178 N.C. App. 322, 326, 631 S.E.2d 150, 153 (2006).

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

IV. MOTION TO DISMISS

[3] Defendant argues that the trial court erred in denying his motion to dismiss the seven charges in the indictment based on his contention that the evidence “was simply unbelievable.” With regard to this issue, we note that the testimony of a prosecuting witness alone is sufficient to support a charge, as the jury must weigh any contradictions or discrepancies in that testimony. *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993). Accordingly, we disagree with defendant’s contention and overrule this assignment of error.

The test for sufficiency of the evidence in a criminal trial is whether there is substantial evidence to support a finding (1) of each essential element of the offense charged, and (2) that the defendant committed the offense. *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Vick*, 341 N.C. 569, 461 S.E.2d 655 (1995). The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; the court need not be concerned with the weight of the evidence. *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999).

In considering a criminal defendant’s motion to dismiss for insufficiency of the evidence, the evidence is to be considered in the light most favorable to the State. The State is entitled to every reasonable inference to be drawn therefrom. *Golphin*, 352 N.C. at 458, 533 S.E.2d at 229; *State v. Williams*, 127 N.C. App. 464, 490 S.E.2d 583 (1997). Review of the sufficiency of the evidence to withstand a defendant’s motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981). Determination of the witness’s credibility is for the jury. *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988). In the present case, it is clear from the transcript that there was sufficient evidence to survive defendant’s motion to dismiss all of the charges.

Defendant was indicted and tried for the crimes of first-degree statutory rape, first-degree statutory sexual offense, and taking indecent liberties with MGV and YGV. The jury convicted defendant of statutory rape against MGV and the attempted rape of YGV. N.C. Gen. Stat. § 14-27.2 (2009) provides, in pertinent part that “[a] person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at last four years older than the victim[.]”

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

Defendant was also convicted of first-degree sexual offense against both MGV and YGV. N.C. Gen. Stat. § 14-27.4(a)(1) (2009) states, in pertinent part:

A person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

Id. The term “sexual act,” as used in this section includes fellatio. *See State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986).

Likewise, defendant was convicted for the crimes of taking indecent liberties with both MGV and YGV. N.C. Gen. Stat. § 14-202.1(a)(1) (2009) states, in pertinent part:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . .

1. Willfully takes . . . any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]

Id.

MGV and YGV both recounted specific details about the sexually abusive conduct of defendant. In the present case MGV testified that: (1) defendant had put his penis in her vagina; (2) defendant had made her lick his penis; (3) defendant touched her breasts and vagina and made her touch his penis. Likewise, YGV testified that: (1) defendant tried to put his penis in her vagina, and the skin of his penis touched her vagina, but his penis did not go inside; (2) defendant made her lick his penis and put his penis inside her mouth; (3) defendant, among other things, made her stroke his penis. Moreover, the girls’ mother, Officer Corinne McCall, Dr. St. Claire, Dr. Moro-Sutherland, Scott Snider, Cindy Frye, and Katie Treadway all testified that MGV and YGV both told them about defendant’s sexually abusive conduct. Additionally, the State introduced as evidence the recorded interviews of the girls that were used by the medical team at the child abuse center to make their treatment recommendations.

It is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 208-09 (1978). If the trial court determines that a reason-

STATE v. ESPINOZA-VALENZUELA

[203 N.C. App. 485 (2010)]

able inference of defendant's guilt may be drawn from the evidence, the court must deny defendant's motion and send the case to the jury even though the evidence may support reasonable inferences of defendant's innocence. *State v. Grigsby*, 351 N.C. 454, 456-57, 526 S.E.2d 460, 462 (2000). "Any contradictions and discrepancies in the evidence are for the jury to resolve, and these inconsistencies, by themselves, do not serve as grounds for dismissal." *State v. Rich*, 132 N.C. App. 440, 452, 512 S.E.2d 441, 449 (1999), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000).

Viewing the evidence in the light most favorable to the State, we hold that there was sufficient evidence to survive defendant's motion to dismiss. Accordingly, we overrule defendant's assignment of error.

V. MOTION FOR APPROPRIATE RELIEF

[4] Defendant contends that the trial court did not have jurisdiction to grant his Motion for Appropriate Relief after defendant gave his notice of appeal. Defendant cites N.C. Gen. Stat. § 15A-1418(a) (2009) in support of this proposition. As a result of defendant's motion for appropriate relief, Judge Stanback reduced defendant's overall sentence from the former minimum of 57.5 years and maximum of 71.25 years in prison to a minimum of 40 years and a maximum of 49.5 years in prison.

Defendant fails to recognize N.C. Gen. Stat. §§ 15A-1414(b)(4) and -1415(b)(8) (2009), which clearly require defendant to address a motion for appropriate relief with regard to the lack of evidence to support the sentence to the sentencing judge within ten days after entry of judgment. To the extent that there might have been any error in Judge Stanback's agreeing to reduce defendant's sentence, we note that defendant created the situation of which he now complains by addressing his motion for appropriate relief to the sentencing judge after having filed his notice of appeal and beyond the 10-day period for filing such motion after entry of the verdict. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2009); *see State v. Franklin*, 23 N.C. App. 93, 95, 208 S.E.2d 381, 383 (1974). Accordingly, we overrule defendant's assignment of error.

VI. DEFENDANT'S SENTENCE VIOLATIVE OF EIGHTH AMENDMENT

[5] Defendant finally contends that the original sentence and the reduced sentence resulting from the trial court's granting of his motion

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

for appropriate relief violate the Eighth Amendment to the United States Constitution. We disagree.

“Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment[.]” *State v. Ysaguiere*, 309 N.C. 780, 786, 309 S.E.2d 436, 441. It is well established that the decision to impose consecutive or concurrent sentences is within the discretion of the trial judge and will not be overturned absent a showing of abuse of discretion. *See id.* at 785, 309 S.E.2d at 440.

Defendant has failed to show how Judge Stanback abused his discretion either in imposing three consecutive sentences within the presumptive range originally, or in reducing the overall time that defendant would serve for two consecutive sentences within the presumptive range after granting defendant’s motion for appropriate relief. Therefore, we conclude that defendant’s assignment of error is without merit.

VII. CONCLUSION

For the above stated reasons, we hold that defendant received a trial free of prejudicial error; the trial court properly denied defendant’s motions to dismiss; the trial court properly granted defendant’s motion for appropriate relief; and defendant’s sentence did not violate the Eighth Amendment to the United States Constitution.

No error.

Judges ELMORE and STEELMAN concur.

IN THE MATTER OF: T.B., C.P., AND I.P.

No. COA09-1401

(Filed 20 April 2010)

1. Child Abuse, Dependency, and Neglect— dependency—sufficiency of evidence

The trial court did not err by finding three minor children to be dependent juveniles. Taken in their entirety, the factual findings demonstrated that respondent mother had significant mental health issues, the children had special needs, and neither respon-

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

dent nor another caretaker demonstrated the ability to meet the children's special needs or to otherwise care for them.

2. Child Abuse, Dependency, and Neglect— neglect—improper to leave allegation undecided

The trial court erred by leaving the allegation of neglect undecided and by explicitly stating that this allegation might be decided at some point in the future. Nothing in N.C.G.S. § 7B-807(a) allows a trial court to hold in abeyance a ruling on an allegation in a petition alleging abuse, neglect, or dependency.

3. Child Visitation— DSS—minimum outline for visitation plan required

The trial court erred by failing to adopt a definitive visitation plan as part of its dispositional decision and leaving respondent mother's visitation with the children to the discretion of DSS. N.C.G.S. § 7B-905(c) provides that any dispositional order which leaves the minor child in a placement outside the home shall provide for appropriate visitation, and our Court of Appeals has held the minimum outline of visitation requires the time, place, and conditions under which visitation may be exercised.

Appeal by respondent from order entered 21 August 2009, *nunc pro tunc* to 23 July 2009, by Judge Beverly Scarlett in Chatham County District Court. Heard in the Court of Appeals 22 March 2010.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for respondent-appellant mother.

Pamela Newell Williams, for guardian ad litem.

ERVIN, Judge.

Respondent-Mother Evelyn P. appeals from an order adjudicating T.B. (Tim), C.P. ("Carl"), and I.P. ("Ida")¹ as dependent juveniles. On appeal, Respondent-Mother challenges the trial court's decision to adjudicate Tim, Carl, and Ida as dependent juveniles; the trial court's failure to decide whether Tim, Carl, and Ida were neglected juveniles; and the trial court's failure to establish a visitation plan for Respondent-Mother at the dispositional phase of this proceeding. After careful consideration of the arguments advanced in

1. "Tim," "Carl," and "Ida" are pseudonyms that will be used throughout the remainder of this opinion for ease of reading and to protect the privacy of the juveniles.

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

Respondent-Mother's brief in light of the record and the applicable law, we affirm the trial court's order in part and reverse and remand this case for further proceedings in part.

On 1 June 2009, the Chatham County Department of Social Services filed juvenile petitions alleging that Tim, Carl, and Ida were neglected and dependent juveniles. The petitions were filed following an altercation at school between Tim and another student which occurred on 28 May 2009. According to DSS, Tim

became angry with another student and started a fight. When school personnel intervened, [Tim] attempted to stab a student and teacher; fought with law enforcement and had to be physically restrained. [Tim] was taken to the ER where it was determined that non-secure custody should be requested.

DSS stated that Tim had been diagnosed with: (1) attention deficit disorder; (2) mood disorder; (3) oppositional defiant disorder; and (4) a learning disorder. DSS further alleged that Tim was an exceptional child and had an Individualized Education Program (IEP) at school. DSS asserted that Respondent-Mother had "not attended to [Tim's] special needs and may have inappropriately disciplined him for his aberrant behavior." DSS further claimed that Tim's siblings, Carl and Ida, were also exceptional children and each had an IEP at school. DSS stated that "[t]hey have missed several days from school and have been observed at home, unsupervised, for long periods of time." DSS alleged that Respondent-Mother had also failed to attend to Carl's and Ida's special needs.

According to DSS, Respondent-Mother had been diagnosed with paranoid schizophrenia and was not taking her medication as prescribed. DSS alleged that "Respondent[-M]other claims that everyone is out to get her and that she has hired an attorney to sue the school, DSS and others who have discriminated against her. She claims to have filed complaints with the NAACP." DSS further stated that Respondent-Mother had recently relocated the family to Chatham County, had moved the family "numerous times," and that similar "circumstances" had occurred in other jurisdictions. Tim, Carl, and Ida were removed from Respondent-Mother's care based upon the issuance of non-secure custody order.

An adjudicatory and dispositional hearing was held before the trial court on 23 July 2009. On 21 August 2009, the trial court entered a written adjudicatory and dispositional order, *nunc pro tunc* to 23 July 2009 (the 21 August 2009 order). The trial court found that Tim,

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

Carl, and Ida were dependent juveniles, but did not rule on the allegation of neglect, stating that the neglect allegation should remain pending before the court. At the dispositional phase of the proceeding, the trial court awarded custody of Tim, Carl, and Ida to DSS based upon a conclusion that it was not in their best interests to return home. On 25 August 2009, Respondent-Mother noted an appeal to this Court from the trial court's order.

[1] On appeal, Respondent-Mother first contends that the trial court erred by concluding that Tim, Carl, and Ida were dependent juveniles. A "dependent juvenile" is:

A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9). "In determining whether a juvenile is dependent, 'the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (*quoting In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *Id.* (*citing In re K.D.*, 178 N.C. App. 322, 328-29, 631 S.E.2d 150, 155 (2006)). In an abuse, neglect or dependency case, review is limited to the issue of whether the conclusion is supported by adequate findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

In this case, the trial court made the following findings of fact in support of its conclusion that Tim, Carl, and Ida were "dependent juveniles":

5. A neglect report was made to [DSS] on April 23, 2009. The report indicated that the children lived in an environment injurious to their welfare and that they were not being properly supervised. The report came on the heels of [Tim's] failure to attend school.

6. The report was accepted and an investigation undertaken. During the course of the investigation, [DSS] became aware that the family has moved many times both from state to state and

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

county to county; that the children have been moved from school to school with no stability in their lives; *that all three children are special needs children and that Respondent[-M]other has mental health problems.*

7. Respondent[-M]other has a significant other, Shirley King, who has been with Respondent[-M]other and the children for twelve or thirteen years and who [has] acted as a parent to the children. She is also the payee for Respondent[-M]other's Social Security Disability Income check.

. . . .

9. Respondent[-M]other reports a history of abuse by . . . , [the] father of the children. She reports that he is violent, follows her when she moves to a new place and that she fears for her safety. She does not know [the father's] whereabouts, his social security number, or his birth date. She believes [that] there are outstanding warrants for his arrest in Maryland. Respondent[-M]other claims that her relocation from place to place has been, in part, to run from [the father] and to keep her children safe.

10. During the course of the investigation of this case, non-secure custody of [Tim] was granted to [DSS], after he was involuntarily committed for psychiatric care. A juvenile petition was filed on all three children. [Tim] was committed and non-secure custody was granted after he assaulted school staff, a student and police officers and caused property damage at school. . . . Additionally, [DSS] had reason to believe that Respondent[-M]other and Ms. King planned to flee the area in order to avoid [DSS] involvement.

11. When [Tim's] case came on to be heard for [a]djudication on June 11, 2009, the Judge presiding became concerned for the safety of [Ida] and [Carl] and awarded non-secure custody of [Ida] and [Carl] to [DSS,] thereby continuing the [a]djudication hearing until July 23, 2009.

12. On her own initiative, Respondent[-M]other participated in a psychological evaluation completed by Dr. Craig Smith, which is summarized in a written report submitted to the Court as evidence at [a]djudication. . . .

13. . . . The report indicates that Respondent[-M]other has suicidal ideation and tendencies, that she is in a state of chronic and

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

substantial stimulus overload, and that she suffers from Chronic Post Traumatic Stress Disorder, Major Depressive Disorder, and Dependent Personality Disorder. Respondent[-M]other's serious psychological problems impair Respondent[-M]other's ability to parent.

14. Respondent[-M]other and Ms. King love the children and appear to have made attempts to do what they thought was best for them. However, *the children have major academic, psychological and behavioral problems and neither Respondent[-M]other nor Ms. King can meet the substantial needs of the children.*

15. [Tim] is currently in Dorothea Dix hospital. He [is] of low weight and height for his age and is diagnosed with ADHD (Attention Deficit Hyperactivity Disorder), ODD (Oppositional Defiant Disorder), Mood Disorder, and Learning Disorder. He feels safe in the hospital and is not ready to be discharged.

16. [Ida] is of low weight and height for her age. While attending school, she was in the Exceptional Children's Program and had an IEP. She is in a licensed foster home and is adjusting well to this out of home placement. Her pediatrician is concerned about her low weight and she was recently diagnosed to [wear] glasses.

17. [Carl] is of low weight and height for his age and is in the 13th percentile when compared to other children his age. While attending school, he was in the Exceptional Children's program. He is diagnosed with ADHD, ODD, and a Learning Disorder. [Carl] is adjusting well to his foster home.

. . . .

23. Custody with a relative is not an option as no relative has been identified as a potential placement option.

(emphasis added). With the exception of Finding of Fact No 14, Respondent-Mother does not contest the sufficiency of the evidence to support these findings on appeal.² Given the absence of any

2. Respondent-Mother has attacked the sufficiency of the evidence to support Finding of Fact No. 4 and some components of Finding of Fact No. 13 that are not quoted in the body of the opinion in her brief. More particularly, Respondent-Mother contends that DSS had a "preconceived narrative" in this case that Respondent-Mother "suffered from paranoid schizophrenia and was delusional," that the trial court erred by stating in Finding of Fact No. 4 that "Dr. Fullwood's notes indicated that Respondent[-M]other was diagnosed for schizophrenia," that "it is the basis upon which she received disability," and that Dr. Fullwood's "notes contradict

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

such challenge, these findings of fact are deemed to be supported by sufficient evidence and are binding on us for purposes of appellate review. N.C.R. App. P. 28(b)(6); see also *In re P.M.*, 169 N.C. App. at 424, 610 S.E.2d at 404-05 (concluding that respondent had abandoned factual assignments of error when she “failed to specifically argue in her brief that they were unsupported by evidence”). As a result, we will evaluate the validity of the trial court’s determination that Tim, Carl and Ida were dependent juveniles as defined in N.C. Gen. Stat. § 7B-101(9) based on the information contained in these findings of fact.

First, Respondent-Mother argues, in reliance on *In re Scott*, 95 N.C. App. 760, 383 S.E.2d 690, *disc. review denied*, 325 N.C. 708, 388 S.E.2d 459 (1989), that “nothing in Dr. Smith’s report—or Dr. Fullwood’s report—in any way suggests that [Respondent-Mother’s] mental health in any way impairs [her] ability to parent.” As we have already noted, however, the trial court found that Dr. Smith noted that Respondent-Mother has “suicidal ideation and tendencies, that she is in a chronic state of stimulus overload,” “that she suffers from Chronic Post Traumatic Stress Disorder, Major Personality Disorder, Major Depressive Disorder, and Dependent Personality Disorder” and that these “serious psychological problems impair Respondent[-M]other’s ability to parent.” In addition, Dr. Smith’s report described Respondent-Mother as “an individual struggling with serious psychological difficulties and in severe emotional distress, all of which is exacerbated by the stress of having her children currently separated from her.” A careful examination of the information contained in Dr. Scott’s report provides ample basis for the trial court’s inference that the mental difficulties under which Respondent-Mother labored impaired her “ability to parent.” As a result, unlike the situation in *Scott*, the trial court found, with ample record support, that Respondent-Mother suffered from significant

Respondent[-M]other’s testimony,” and that the trial court erred by stating in Finding of Fact No. 13 that Respondent-Mother “appears to have serious psychological problems, to be in denial of having psychological problems and is therefore not a good candidate for counseling or psychotherapy” and to “have ‘limited resources for dealing with the demands of her life situation.’” However, since we have not relied on those portions of Finding of Fact Nos. 4 and 13 that Respondent-Mother has challenged in examining the lawfulness of the trial court’s finding that Tim, Carl, and Ida are dependent juveniles, we need not examine the validity of Respondent-Mother’s challenges to these portions of the trial court’s findings in detail in this opinion. *In re T.M.*, 180 N.C. 539, 547, 638 S.E.2d 236, 240 (2006) (stating that “[w]hen, however, other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error”) (citing *In re Beck*, 109 N.C. App. 539, 548, 428 S.E.2d 232, 238 (1993)).

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

psychological conditions, the existence of which she does not dispute on appeal, and that these conditions impair her ability to parent Tim, Carl, and Ida.

Secondly, Respondent-Mother contends that the trial court did not delineate the evidence upon which it relied in making Finding of Fact No. 14, which addresses the ability of Respondent-Mother and Ms. King to meet the children's needs.³ Respondent-Mother has not cited any authority indicating that such explanatory findings are legally necessary, and we know of none. In addition, we have reviewed the record and found that it contains sufficient evidence to support the statements made in Finding of Fact No. 14 quoted above. The DSS court report, which was admitted into evidence, states that:

When a family moves as frequently as [Respondent-Mother] and the children have, it is extremely difficult to ensure that the children's medical and mental health needs are being met. . . .

Historically, the children have been to so many different medical providers that no, one, particular medical provider has a complete/consistent history of the children's needs. There are many questions in reference to not only the psychological impact it has on the children with multiple moves, but also with regards to the children developing a strong sense of self; learning how to trust adults; learning how to establish and form strong, secure bonds with people. The children live in an environment where at any time they may be packed up and moved to yet another place to "start all over." When the moves have taken place, the children lose many of their belongings; the family literally has to start over, and friends, if they have made any, are not there anymore. All three of the children talk about how sad it makes them to move all the time; how hard it is on them and that they do not want to move anymore.

3. In addition, in reliance on *In re J.A.G.*, 172 N.C. App. 708, 716, 617 S.E.2d 325, 331-32 (2005), Respondent-Mother argues that the trial court's failure to adjudicate Tim, Carl, and Ida to be neglected juveniles precludes the trial court from adjudicating them to be dependent juveniles. We do not, however, find *J.A.G.* to be controlling in this instance, since the *J.A.G.* Court found the record insufficient to support a determination that "respondent had not appropriately cared for" the juvenile or that "respondent was not willing to investigate the needs of J.A.G. in a safe environment." *Id.* Since the trial court did not expressly or impliedly reject DSS' allegation that Tim, Carl, and Ida were neglected juveniles and since the trial court expressly found that they were dependent juveniles, we do not believe that the principle enunciated in *J.A.G.* has any application in this proceeding.

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

The children have all developed behaviors indicative of children who have been traumatized. [Carl] and [Tim], in particular, are exhibiting extreme forms of violence, aggression, and acting out and [DSS] is not convinced, as well as different providers in the past, that these behaviors are solely manifested genetically or a result of the multiple disruptions in the children's lives. [Ida] is beginning to develop concerning behaviors as well in reference to curling up in a ball in a corner and detaching herself from others and as one of her teachers reported, becoming non-functional.

[Tim] remains at the hospital in order to get a full psychological assessment of him and he is now becoming aggressive and they are having to try medication in [] order to address the behavior. Notably [Tim] has told [DSS] that he does not want to go back home. Due to [Tim]'s significant mental health issues, it is unclear as to what school [Tim] will be enrolled in following this hospitalization. The school will need to ensure both the safety of [Tim] as well as the other students.

[Respondent-Mother] and Ms. King appear to love the children. It is believed that they are doing the best they can to provide for them and that the decisions they make are what they think is what is in the best interests of the children. [DSS] is unsure as to the extent of [Respondent-Mother's] mental illness and how it does impact her in making sound decisions for the children. [Respondent-Mother] seems to distrust most service providers and people who want to help the family as evidenced by [Respondent-Mother's] insistence that her rights are being violated by the school system, law enforcement, and Social Services.

As a result, the record contains substantial evidence tending to support the information contained in Finding of Fact No. 14.

Finally, in reliance on *In re P.M.*, 169 N.C. App. at 428, 610 S.E.2d at 406, Respondent-Mother contends that "the trial court found without basis [that Ms.] King was unable to care for the children." A careful review of the trial court's findings of fact indicates that the trial court had ample basis for making this determination. The trial court's unchallenged findings indicate that the children had been living with Respondent-Mother and Ms. King, who had been functioning in a parental role, for twelve or thirteen years. Although the trial court found that Respondent-Mother and Ms. King "love the children and appear to have made attempts to do what they thought was best for them," "the children have major academic, psychological and behav-

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

ioral problems . . .” In addition, the trial court found that Tim is “of low weight and height for his age” and has been “diagnosed with ADHD (Attention Deficit Hyperactivity Disorder), ODD (Oppositional Defiant Disorder), Mood Disorder, and Learning Disorder;” that Ida “is of low weight and height for her age” and that she “was in the Exceptional Children’s Program and had an IEP;” and that Carl “is of low weight and height for his age,” “is in the 13th percentile when compared to other children his age,” “was in the Exceptional Children’s program,” and has been “diagnosed with ADHD, ODD and a Learning Disorder.” When considered in conjunction, these findings demonstrate that, despite having had ample opportunity to parent the children in conjunction with Respondent-Mother, Ms. King has not demonstrated the ability to care for the children in such a manner as to produce successful outcomes. Instead, while under the care of Respondent-Mother and Ms. King, the children have all had low weight and height and have had “major academic, psychological and behavioral problems.” This evidence, which is embodied in undisputed findings of fact, is more than sufficient to support the trial court’s finding that “neither Respondent[-M]other nor Ms. King can meet the substantial needs of the children.”

Taken in their entirety, the factual findings quoted above demonstrate that Respondent-Mother had significant mental health issues, the children have special needs, and that neither Respondent-Mother nor Ms. King have demonstrated the ability to meet the children’s special needs or to otherwise care for them in such a way as to produce successful outcomes. Furthermore, the trial court’s findings suggest that the children suffer as a result of the family’s multiple relocations; however, Respondent-Mother and Ms. King apparently thought about flight at the time that DSS involvement began despite the adverse impact that such an action would have on the children. In addition, there is no evidence that Respondent-Mother ever suggested appropriate alternate placements for the children. *See In re D.J.D.*, 171 N.C. App. 230, 239, 615 S.E.2d 26, 32 (2005). As a result, based on the findings of fact quoted above, we hold that the trial court properly concluded that Tim, Carl, and Ida were dependent juveniles.

[2] Secondly, Respondent-Mother argues that the trial court erred by leaving the allegation of neglect undecided and by explicitly stating that this allegation might be decided at some point in the future. According to Respondent-Mother, since the trial court did not adjudicate the juveniles as neglected, it should have dismissed the neglect allegation since simply leaving that allegation pending was not a per-

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

missible statutory option. We agree with Respondent-Mother that the relevant statutory provisions do not contemplate an action such as that taken by the trial court in this instance.

“The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile’s parent to assure due process of law.” N.C. Gen. Stat. § 7B-802.

If the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state. If the court finds that the allegations have not been proven, the court shall dismiss the petition with prejudice, and if the juvenile is in nonsecure custody, the juvenile shall be released to the parent, guardian, custodian, or caretaker.

N.C. Gen. Stat. § 7B-807(a). As a result, when a trial court is required to adjudicate allegations of abuse, neglect, or dependency, it must either adjudicate the juvenile as abused, neglected, or dependent if the allegations are proven by clear and convincing evidence or dismiss the allegation if the necessary evidentiary showing is not made. Simply put, nothing in N.C. Gen. Stat. § 7B-807(a) allows a trial court to hold a ruling on an allegation in a petition alleging abuse, neglect, or dependency in abeyance, as the trial court attempted to do in this instance.

According to the Guardian *ad Litem*, the trial court’s ruling was, in actuality, a permissible continuance. In essence, the Guardian *ad Litem* argues that the trial court wished to receive further information regarding Respondent-Mother’s psychological condition prior to ruling on the neglect allegation. Acceptance of the Guardian *ad Litem*’s argument would tend to suggest that the trial court intended to rule on the neglect allegation at a later time. Nothing in the record, however, provides any support for the Guardian *ad Litem*’s contention. The record does not indicate that the trial court scheduled any further adjudicatory hearings for the purpose of considering the neglect allegation. Furthermore, while the trial court did order Respondent-Mother to execute a release of her mental health and medical records and to undergo a second psychological evaluation with a psychologist of her choosing, there is nothing in the record to demonstrate that the trial court’s attempt to obtain this additional information bore any relation to future proceedings intended to address the as-yet-undecided neglect allegation. Instead, the record

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

suggests that the trial court sought this additional information for the purpose of assisting in the development of a dispositional plan that would further the best interests of the juveniles. As a result, we are not persuaded by the Guardian *ad Litem's* contention that the trial court's decision to refrain from deciding the issues raised by the neglect allegation was tantamount to a continuance and remand this proceeding for the entry of additional findings and conclusions based on the existing record adjudicating the neglect allegation.⁴

[3] Finally, Respondent-Mother argues that the trial court erred by failing to adopt a definitive visitation plan as part of its dispositional decision and leaving Respondent-Mother's visitation with the children to the discretion of DSS instead. At a 18 June 2009 hearing, the trial court ordered that "Respondent[-M]other's visitation, if any, with the juveniles is in the discretion of the treatment team." In the 21 August 2009 order, the trial court noted that "visits between Respondent[-M]other, Ms. King and the children are going well and all are adhering to the rules for visitation as established by [DSS]." The only other reference to visitation in the 21 August 2009 order is the statement that "[a]ll contact between Respondent[-M]other, Ms. King, and the juveniles shall remain supervised." Respondent-Mother contends that the trial court erred by failing to include the outline of a visitation plan in its order, thereby effectively leaving her visitation with Tim, Carl, and Ida in the discretion of DSS. See N.C. Gen. Stat. § 7B-905(c); *In re E.C.*, 174 N.C. App. 517, 621 S.E.2d 647 (2005). We agree.

N.C. Gen. Stat. § 7B-905(c) provides that any dispositional order which leaves the minor child in a placement "outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." This Court has held that "[a]n appropriate visitation plan" that complies with N.C. Gen. Stat. § 7B-905(c) "must provide for a minimum outline of visitation, such as the *time, place, and conditions* under which visitation may be exercised." *In re E.C.*, 174 N.C. App. at 523, 621 S.E.2d at 652 (emphasis added). Furthermore,

4. Although Respondent-Mother argues, in reliance on *In re S.R.G.*, — N.C. App. —, —, 684 S.E.2d 902, 905 (2009), *disc. review denied and cert. denied*, 363 N.C. 804, S.E.2d (2010), that "the consequence of" the trial court's failure to find the children to be "neglected juveniles" "is the nonexistence of the other . . . ground[] alleged by DSS," we do not believe that the logic upon which Respondent-Mother relies is applicable in this instance given that the trial court, instead of simply failing to find the neglect ground without comment, expressly declined to address it and stated that "[t]he issue of neglect shall remain pending before this court."

IN RE T.B., C.P., & I.P.

[203 N.C. App. 497 (2010)]

even if the trial court determines that visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.

In re K.C., — N.C. App. —, —, 681 S.E.2d 559, 563 (2009).

The provisions of the trial court's dispositional order concerning visitation are, at an minimum, unclear. At best, the trial court's order continued in effect a prior plan which left the scope and extent of visitation to "the discretion of the treatment team." At worst, the trial court simply failed to address the issue of visitation in its 21 August order. Under either interpretation, the visitation provisions of the 21 August order failed to comply with the requirements of N.C. Gen. Stat. § 7B-905(c) by failing to address "the time, place, and conditions under which visitation may be exercised." *In re E.C.*, 174 N.C. App. at 523, 621 S.E.2d at 652. As a result, we remand this case to the trial court for the entry of additional findings and conclusions relating to the issue of an appropriate visitation plan.

Thus, for the reasons set forth above, we conclude that the trial court did not err by finding Tim, Carl, and Ida to be "dependent juveniles." However, we also conclude that the trial court erred by failing to decide the issue of whether Tim, Carl, and Ida were "neglected juveniles" and by failing to make appropriate findings and conclusions relating to the issue of an appropriate visitation plan. As a result, the trial court's order should be, and hereby is, affirmed in part and reversed and remanded for further proceedings not inconsistent with this proceeding in part.

Affirmed in part; reversed and remanded in part.

Judges McGEE and ROBERT C. HUNTER concur.

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

JULIANNA SIMMONS HENRY, PLAINTIFF v. PETER AXEL KNUDSEN, DEFENDANT

No. COA09-381

(Filed 20 April 2010)

1. Negligence— admissions—affirmative defense

The trial court did not err by denying plaintiff's motion for a directed verdict in a traffic accident case where plaintiff contended that defendant's admissions established defendant's negligence.

2. Negligence— sudden incapacitation—evidence sufficient

The trial court did not err by denying plaintiff's motion for a directed verdict at the close of all of the evidence in a car accident case in which defendant raised the affirmative defense of sudden incapacitation. Defendant's credibility was for the jury to decide.

3. Negligence— instructions—objections not specific

There was no error in the jury instructions given in an automobile accident case when the parties stipulated in the record that plaintiff objected to the instructions, but the transcript did not show an objection by plaintiff and the stipulation did not specify the content of the objection. Even so, the record does not contain any request for alternative instructions and the court accurately instructed the jury on the relevant law.

4. Negligence— sudden incapacitation—defendant's credibility

The trial court did not err by denying plaintiff's motion for judgment notwithstanding the verdict and a new trial in a case arising from an automobile accident in which plaintiff raised the affirmative defense of sudden incapacitation.

Appeal by plaintiff from judgment entered 1 August 2008 and by order entered 14 November 2008 by Judge Jane P. Gray in District Court, Wake County. Heard in the Court of Appeals 30 September 2009.

E. Gregory Stott, for plaintiff-appellant.

Larcade & Heiskell, PLLC, by Christopher N. Heiskell, for defendant-appellee.

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

STROUD, Judge.

Julianna Simmons Henry (“plaintiff”) appeals from the trial court’s judgment entered consistent with the jury’s verdict that plaintiff was not injured by the negligence of Peter Axel Knudsen (“defendant”) and order entered denying her motions for directed verdict, judgment notwithstanding the verdict and a new trial. For the following reasons, we affirm.

I. Background

Plaintiff’s claim arose from an automobile accident which occurred on 9 February 2007. The facts regarding the accident are not in dispute. Plaintiff was driving her 2004 Mazda automobile north on Wilmington Street in Raleigh, North Carolina, and defendant was driving his 2004 Pontiac automobile east on Morgan Street. Defendant’s automobile collided with plaintiff’s automobile at the intersection of Wilmington Street and Morgan Street. Plaintiff was injured as a result of the accident.

Plaintiff filed a complaint on 2 March 2007 alleging that defendant was negligently operating his automobile when he collided with plaintiff’s automobile, and that his negligence was the proximate cause of plaintiff’s injuries. On 2 May 2007, defendant filed an answer denying negligence and asserting the defense of “sudden incapacitation[,] . . . which was unforeseeable and theretofore unknown to the defendant and as a result the defendant was unable to control the motor vehicle he was operating.” Plaintiff subsequently served requests for admission on defendant. On 20 February 2008, defendant filed responses to plaintiff’s request for admissions.

The case was tried before a jury in District Court, Wake County on 14 July 2008. At the close of plaintiff’s evidence and at the close of all evidence, plaintiff made motions for directed verdicts on the issue of defendant’s negligence and proximate causation. The trial court denied both motions. On 15 July 2008, a jury found that plaintiff was not injured by the negligence of defendant. On 1 August 2008, the trial court entered judgment consistent with the jury’s verdict. On 15 August 2008, plaintiff filed a motion for judgment notwithstanding the verdict and for a new trial. By order dated 14 November 2008, the trial court denied plaintiff’s motion for judgment notwithstanding the verdict and a new trial. On 17 November 2008, plaintiff filed timely notice of appeal to this Court.

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

II. Plaintiff's Motions for Directed Verdict

[1] Plaintiff first contends that “defendant through his responses to the plaintiff’s Requests For Admissions established that he was negligent as a matter of law, that the plaintiff was injured and that the automobile accident caused those injuries.” Plaintiff argues that since these admissions were admitted into evidence and establish the negligence of defendant, the trial court erred in denying plaintiff’s motion for directed verdict.

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party’s favor, or to present a question for the jury.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citations omitted). “[A] directed verdict . . . may be entered in favor of the party with the burden of proof ‘where credibility is manifest as a matter of law.’ ” *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986) (quoting *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979)). “However, in order to justify granting a motion for a directed verdict in favor of the party with the burden of proof, the evidence must so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn.” *Murdock v. Ratliff*, 310 N.C. 652, 659, 314 S.E.2d 518, 522 (1984) (citing *Burnette*, 297 N.C. at 536, 256 S.E.2d at 395.). In *Burnette*, our Supreme Court listed three recurrent situations where credibility of a movant’s evidence is “manifest” as a matter of law:

- (1) Where [a] non-movant establishes proponent’s case by admitting the truth of the basic facts upon which the claim of proponent rests.
- (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents.
- (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradiction.

...

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

[W]hile credibility is generally for the jury, courts set the outer limits of it by preliminarily determining whether the jury is at liberty to disbelieve the evidence presented by movant. Needless to say, the instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury.

297 N.C. at 537-38, 256 S.E.2d at 396 (citations and quotation marks omitted). “[I]f there is conflicting testimony that permits different inferences, one of which is favorable to the non-moving party, a directed verdict in favor of the party with the burden of proof is improper.” *United Lab. v. Kuykendall*, 322 N.C. 643, 662, 370 S.E.2d 375, 387 (1988). To establish a *prima facie* case for negligence, a plaintiff must show the following essential elements: “(1) defendant owed plaintiff a duty of reasonable care; (2) defendant breached that duty; (3) defendant’s breach was an actual and proximate cause of plaintiff’s injury; and (4) plaintiff suffered damages as the result of defendant’s breach.” *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (citation omitted), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 186 (1994).

At trial, plaintiff made a motion for directed verdict at the close of plaintiff’s evidence, arguing that defendant’s admissions established that plaintiff was negligent. In her brief, plaintiff contends that the following admissions by defendant establish negligence on the part of defendant:

3. The plaintiff was operating her vehicle in a careful and prudent manner and at a reasonable rate of speed for the conditions then and there existing.

RESPONSE: Admitted.

4. That as the plaintiff drove the vehicle, which she was operating, into the intersection of Wilmington Street and Morgan Street, the defendant, Peter Axel Knudsen, failed to stop his vehicle for a traffic signal, which was emitting a steady red light in his direction of travel, and thereafter drove his vehicle into the side of the plaintiff’s vehicle.

RESPONSE: Admitted.

...

7. That the plaintiff, Julianna Simmons Henry, was injured in the aforesaid automobile accident on February 9th, 2007.

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

RESPONSE: It is admitted that Plaintiff suffered some degree of injury.

...

16. That as a proximate cause of the aforescribed accident the plaintiff was required to obtain ambulance service from Wake County E.M.S.

RESPONSE: Admitted.

- a) That Exhibit A attached hereto is an accurate copy of the ambulance call report prepared by the ambulance service.

RESPONSE: Admitted.

- b) That Exhibit B attached hereto is an accurate copy of the bill submitted to plaintiff for the aforesaid ambulance service.

RESPONSE: Admitted.

- c) That the aforesaid ambulance bill was incurred as a result of the aforescribed collision.

RESPONSE: Admitted.

- d) That the aforesaid collision was a proximate cause of plaintiff incurring the aforesaid ambulance bill.

RESPONSE: Admitted.

...

17. That as a proximate cause of the aforescribed accident the plaintiff was required to seek medical attention at WakeMed Emergency Room in order to obtain treatment of the injuries sustained.

RESPONSE: Admitted.

...

19. That a copy of the bill from WakeMed, which is attach (sic) hereto as Exhibit C, is a true and accurate copy of the bill received by the plaintiff from the said hospital on or about the date of the accident.

RESPONSE: Admitted.

20. That the bill, which is attached hereto as Exhibit D from Wake Emergency Physicians, is a true and accurate copy of

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

the bill received by the plaintiff from the emergency room doctor on or about the date of the accident.

RESPONSE: Admitted.

21. That the bill, which is attached hereto as Exhibit E from Wake Radiology, is a true and accurate copy of the bill received by the plaintiff from the said radiologist on or about the date of the accident.

RESPONSE: Admitted.

22. That Exhibits C, D and E are true and accurate copies of bills received by the plaintiff which bills were incurred as a result of the aforescribed collision.

RESPONSE: Admitted.

. . .

24. That these costs were incurred as a proximate cause of the collision between the plaintiff, Julianna Simmons Henry, and the defendant Peter Axel Knudsen.

RESPONSE: Admitted.

25. That the aforesaid bills (Exhibits C, D and E) may be admitted into evidence without the necessity of subpoenaing witnesses from the hospital and radiologist.

RESPONSE: Admitted.

Viewing defendant's responses to plaintiff's request for admissions in the light most favorable to defendant, *Davis*, 330 N.C. at 322, 411 S.E.2d at 138, defendant makes no admission of negligence. Defendant's admissions establish that: 1. there was an collision between plaintiff's and defendant's automobiles; 2. plaintiff was not driving in a negligent manner; 3. plaintiff was injured in the collision; 4. plaintiff received medical treatment and incurred medical bills as a result of that treatment. See *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992) ("[N]egligence is not presumed from the mere fact of injury."). Although Admission No. 24 states that the medical costs were proximately caused by the collision, defendant did not admit *his negligence* was a proximate cause of the collision or of plaintiff's injuries. See *Winters*, 115 N.C. App. at 694, 446 S.E.2d at 124. Actually, defendant repeatedly denied that he was negligent in his responses to the request for admissions:

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

8. That the defendant's, Peter Axel Knudsen, negligence on such occasion was the proximate cause of plaintiff's injuries.

RESPONSE: Denied.

9. That the defendant's negligence on such occasion was [the] proximate cause of the plaintiff's injuries and damages.

RESPONSE: Denied.

...

18. That the negligence of the said defendant at the aforesaid time and place was a proximate cause of plaintiff having to seek the medical attention referred to in request for admission number 17.

RESPONSE: Denied.

...

23. That the aforesaid bills were incurred as a result of the negligence of the defendant.

RESPONSE: Denied.

These responses to the requests for admissions by defendant clearly contradict plaintiff's assertion that defendant admitted that his negligence proximately caused plaintiff's injuries.

Defendant's responses to plaintiff's request for admissions further show that defendant never denied the existence of facts supporting his affirmative defense of sudden incapacitation and never made an admission that all the facts alleged in plaintiff's complaint were true:

27. That there are no facts upon which the defendant, Peter Axel Knudsen, relies as a basis for any defense as to plaintiff's allegations of negligence in this action.

RESPONSE: Denied.

28. That there are no documents, writings, letters, records or papers of any sort upon which the defendant, Peter Axel Knudsen, intends to utilize as evidence of or a basis for any defense in this action.

RESPONSE: Denied.

29. That there are no facts upon which the defendant, Peter Axel Knudsen, relies as a basis for his allegations that he

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

was stricken with a “sudden incapacitation and a sudden emergency”.

RESPONSE: Denied.

30. That there are no documents, writings, letters, records or papers of any sort upon which the defendant, Peter Axel Knudsen, intends to utilize as evidence of or a basis upon which the defendant, Peter Axel Knudsen, relies to support his allegations that he was stricken with a “sudden incapacitation and a sudden emergency”.

RESPONSE: Denied.

31. Every statement or allegation contained in the plaintiff’s Complaint is true and correct.

RESPONSE: Denied.

As defendant’s responses did not admit negligence or proximate causation, he did not admit “the truth of the basic facts upon which the claim of [plaintiff] rests” and, thus, the credibility of plaintiff’s evidence is not established as a matter of law. *Burnette*, 297 N.C. at 537-38, 256 S.E.2d at 396. As to the other methods enumerated in *Burnette* for plaintiff to establish the credibility of her evidence as a matter of law, plaintiff fails to point us to any “controlling” documentary evidence that defendant did not challenge or instances where defendant failed to contradict oral testimony offered by plaintiff’s witnesses. *Id.* In addition, it would have been inappropriate for the trial court to grant plaintiff’s motion for a directed verdict at the close of plaintiff’s evidence where the defendant had raised an affirmative defense of sudden incapacitation without giving the defendant an opportunity to present evidence supporting his affirmative defense. Therefore, we are not persuaded by plaintiff’s argument.

[2] Plaintiff also made a motion for directed verdict at the close of all evidence. When a defendant raises an affirmative defense, such as sudden incapacitation, “a motion for directed verdict is properly granted against the defendant where the defendant fails to present more than a scintilla of evidence in support of each element of his defense.” *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991).

The elements of the affirmative defense of sudden incapacitation are “as follows: (i) the defendant was stricken by a sudden incapacitation, (ii) this incapacitation was unforeseeable to the defendant,

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

(iii) the defendant was unable to control the vehicle as a result of this incapacitation, and (iv) this sudden incapacitation caused the accident.” *Word v. Jones ex rel. Moore*, 350 N.C. 557, 562, 516 S.E.2d 144, 147 (1999) (citation omitted).

Here the record shows that defendant presented evidence to support the elements of sudden incapacitation. Defendant testified that in 1989 he had a massive heart attack and underwent bypass surgery. About 2000 or 2001, defendant had another heart attack and had four stents put into his heart by his treating physician. In 2005, because of problems with his heart, defendant had open heart surgery and was given a mechanical heart valve and a pacemaker. Defendant testified that these treatments left him with congestive heart failure. Despite his heart problems, defendant was given the authority to operate a motor vehicle by the Division of Motor Vehicles based upon a recommendation by his treating physician. Defendant testified that prior to 9 February 2007, he had not had any episodes of sudden onset of chest pain like the one he experienced that day or any loss of consciousness while driving.

On the day of the accident, defendant testified that moments before the collision he had an “unbelievable” and “awful pain” in his chest, but before he could reach his nitroglycerin tablets he “blackened out.” Defendant testified that the next thing he remembered was “a bang.” Defendant testified that he regained consciousness, was able to place a nitroglycerin tablet under his tongue, and “in about a minute the [chest] pain started to subside[.]” Plaintiff argues that defendant’s claim of sudden onset of pain and loss of consciousness is not credible, based upon his failure to report these problems to emergency medical personnel who responded to the accident. However, defendant’s credibility was for the jury to decide. *See Burris v. Shumate*, 77 N.C. App. 209, 212, 334 S.E.2d 514, 516 (1985) (“[C]redibility of the testimony is for the jury to decide.”). Taken in the light most favorable to defendant, the above evidence establishes “more than a scintilla of evidence in support of each element of his defense[.]” *Snead*, 101 N.C. App. at 464, 400 S.E.2d at 92, and the trial court properly denied plaintiff’s motion for a directed verdict at the end of all evidence.

III. Jury Instructions

[3] Next plaintiff contends that the “instructions of law given by the trial court were erroneous and contrary to the law and the evidence.” In the record on appeal, the parties stipulated that plaintiff objected

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

to the trial court's jury instructions. Despite this stipulation, the portions of the trial transcript included in the record on appeal does not show any objection by plaintiff to the jury instructions. Because the objection is not included in the transcript, and because the stipulation in the record does not specify the content of plaintiff's objection, we are unable to determine the nature of plaintiff's objection at trial or what alternative instructions, if any, plaintiff requested that the trial court give to the jury. "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection[.]" N.C.R. App. P. 10(b)(2). Plaintiff argues in her brief that at trial she specifically objected to defendant's request for N.C.P.I. Civil—102.10, 102.11, 102.12 and 102.19, and that she renewed her objections after the trial court concluded giving instructions to the jury. Even if we assume that plaintiff did make these specific objections, the record does not contain any request by plaintiff for alternative instructions or any indication of the argument plaintiff made, if any, as to why these pattern instructions are in error or should not be used in this case. *See State v. Hood*, 332 N.C. 611, 617, 422 S.E.2d 679, 682 (1992) (holding that a party's request for a jury instruction at the charge conference is sufficient compliance with N.C.R. App. P. 10(b)(2) to warrant full review on appeal). Further, this Court has held that "the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *In re Will of Leonard*, 71 N.C. App. 714, 717, 323 S.E.2d 377, 379 (1984) (citation omitted). "Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law." *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006) (citation omitted). A thorough review of the trial transcript reveals that the trial court accurately instructed the jury on the relevant law of negligence, sudden incapacitation, and proximate causation pursuant to the pattern jury instructions. Therefore, we are not persuaded by plaintiff's argument.

IV. Entry of Judgment, Judgment Notwithstanding the Verdict and New Trial

[4] Finally plaintiff contends that the trial court erred in its entry of judgment for defendant and in denying plaintiff's motion for judgment notwithstanding the verdict and a new trial. Plaintiff further contends that "[i]t was an abuse of discretion on the part of the trial judge not to set aside the jury's verdict."

HENRY v. KNUDSEN

[203 N.C. App. 510 (2010)]

The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice. The trial judge is vested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony. Since such a motion requires his appraisal of the testimony, it necessarily invokes the exercise of his discretion. It raises no question of law, and his ruling thereon is irreviewable in the absence of manifest abuse of discretion.

Britt v. Allen, 291 N.C. 630, 634-35, 231 S.E.2d 607, 611 (1977) (citation and quotation marks omitted).

“A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict.” *Hodgson Constr., Inc. v. Howard*, 187 N.C. App. 408, 411, 654 S.E.2d 7, 10 (2007) (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 509, 668 S.E.2d 28 (2008).

‘When a judge decides that a directed verdict [or JNOV] is appropriate, actually he is deciding that the question has become one exclusively of law and that the jury has no function to serve.’ However, ‘a genuine issue of fact must be tried by a jury unless this right is waived.’

Id. at 411, 654 S.E.2d at 10-11 (quoting N.C. Gen. Stat. § 1A-1, Rule 50, (comments) and *In re Will of Jarvis*, 334 N.C. 140, 143, 430 S.E.2d 922, 923 (1993)).

Here, in support of plaintiff’s argument that the trial court erred in denying her motion for judgment notwithstanding the verdict, not setting aside the jury’s verdict, and not granting her a new trial, plaintiff again argues that defendant’s testimony at trial was not credible. Our appellate courts have consistently held that “[i]t is the jury’s function to weigh the evidence and to determine the credibility of witnesses.” *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 664 (1997); *see Horne v. Vassey*, 157 N.C. App. 681, 687, 579 S.E.2d 924, 928 (2003) (“[A]s the finder of fact, the jury is entitled to draw its own conclusions about the credibility of the witnesses and the weight to accord the evidence.” (quotation marks omitted)). As plaintiff points out, the trial court was not presented with a question “exclusively of law [so] that the jury [had] no function to serve[;]” there were genuine issues of material fact, primarily the credibility of the witnesses’ oral testimony, that justify the trial court’s decision to send this case to the jury. *Howard*, 187 N.C. App. at 411, 654 S.E.2d at

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

10-11. Further, a thorough review of the evidence presented at trial by both plaintiff and defendant shows that there was sufficient evidence to justify the jury's verdict. Therefore, we are not persuaded by plaintiff's argument and hold that the trial court did not err in its entry of judgment and denial of plaintiff's motion for judgment notwithstanding the verdict and a new trial.

V. Conclusion

For the foregoing reasons, we affirm the trial court's judgment in favor of defendant and denial of plaintiff's motions for directed verdict, judgment notwithstanding the verdict and for a new trial.

AFFIRM.

Judges GEER and ERVIN concur.

ALLEN GRAY, EMPLOYEE, PLAINTIFF v. RDU AIRPORT AUTHORITY, EMPLOYER,
TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA09-1282

(Filed 20 April 2010)

Workers' Compensation— injury by accident—Achilles tendon injury—no unusual or unforeseen circumstances

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's Achilles tendon injury was not a compensable injury by accident. There were no unusual or unforeseen circumstances that interrupted plaintiff's work routine.

Appeal by plaintiff from opinion and award entered 16 July 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 February 2010.

Scudder & Hedrick, PLLC, by John A. Hedrick, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Jennifer S. Jerzak, for defendants-appellees.

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

HUNTER, Robert C., Judge.

Plaintiff Allen Gray appeals the opinion and award of the North Carolina Industrial Commission denying his claim for workers' compensation benefits. Plaintiff primarily argues that the Commission failed to make sufficient findings of fact to support its determination that his Achilles tendon injury was not a compensable injury by accident. We conclude that the Commission's findings, supported by competent evidence in the record, support its conclusion. We, therefore, affirm the Commission's decision.

Facts

At the time of the hearing before the deputy commissioner, plaintiff was 52 years old. Plaintiff graduated from high school but had no other education or vocational training. After graduating from high school, plaintiff worked on his family's farm until he was 30. He then worked for Southbend, assembling commercial cook stoves. After working for Southbend for 17.5 years, plaintiff was employed by the Department of Agriculture for approximately one year, working as a security guard at the North Carolina State Fairgrounds.

In September 2006, plaintiff was hired by defendant-employer RDU Airport Authority to work as a traffic control officer. Plaintiff's responsibilities included monitoring and controlling vehicular traffic around the airport's terminals and stopping traffic to allow pedestrians to cross the roadway separating the airport's parking lots from the terminals. His work duties required him to be standing or walking during his entire shift, excluding breaks.

Prior to plaintiff's injury on 20 November 2007, plaintiff sustained an injury to his left foot. Plaintiff suffered from a bone spur and tendinitis in his left Achilles tendon and was being treated by Dr. David Boone, a certified orthopedic surgeon with Raleigh Orthopaedic Clinic. After conservative medical treatment failed, Dr. Boone recommended surgery. In June 2007, plaintiff took a medical leave of absence, and on 13 June 2007, Dr. Boone performed a surgical excision of the bone spurring posterior to the calcaneus of the left foot and debridement of the Achilles tendon with re-attachment of the tendon.

During routine follow-up visits on 28 August 2007, 25 September 2007, and 16 October 2007, plaintiff continued to complain of persistent pain. During the 16 October 2007 visit, Dr. Boone diagnosed plaintiff with persistent pain after surgery and explained to

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

plaintiff that it could take up to a year to resolve. Plaintiff was written out of work until 10 September 2007, with plaintiff to return to full duty work on that date. Plaintiff returned to work sometime around 10 September 2007, with no work restrictions assigned by Dr. Boone, and plaintiff performed his usual work duties. Between 10 September 2007 and 20 November 2007, plaintiff's recovery was progressing normally.

On 20 November 2007, plaintiff was working outside Terminal C at RDU. Between Terminal C and the adjacent parking lot, there is a pedestrian crosswalk, which also serves as a speed bump, roughly six feet wide and six inches taller than the surrounding pavement. From the top, the crosswalk slopes downward to the pavement of the roadway. Plaintiff was standing in the crosswalk, stopping vehicular traffic to allow pedestrians to use the crosswalk, when he stepped backward onto the section of the crosswalk that slopes down to the roadway. Plaintiff felt a "popping sensation" in his left leg, near his ankle.

Plaintiff reported the incident to his supervisor and then drove himself to Western WakeMed Emergency. Plaintiff reported that he had undergone left heel spur surgery in June 2007 and had felt a "pop" with immediate onset of acute left heel pain after stepping backward on a curb. Based on x-rays, plaintiff was diagnosed with a ruptured Achilles tendon due to trauma. Plaintiff was restricted from work for three days and told to follow-up with his treating orthopedist.

Dr. Boone saw plaintiff on 27 November 2007 and noted that plaintiff had stepped back off a curb and felt a "pop." Dr. Boone found a gap in the Achilles tendon near where it attaches to the calcaneus, consistent with an Achilles tendon rupture. X-rays showed that the suture anchors were in place and that there was no fracture. Dr. Boone recommended surgery to repair the Achilles tendon and told plaintiff that he would be non-weight bearing for at least six weeks. He also recommended a slower rehabilitation period. On 13 December 2007, Dr. Boone performed the surgery at Rex Healthcare to repair plaintiff's Achilles tendon. Dr. Boone also removed the hardware in the left calcaneus.

After filing a claim for benefits, plaintiff requested on 31 December 2007 that the case be heard by a deputy commissioner. Dr. Boone saw plaintiff for his first post-operative visit on 18 December 2007. Plaintiff reported no complaints. Dr. Boone continued to write plaintiff out of work until 5 February 2008, at which time he released

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

him to return to work with the restriction of seated work only. In a note dated 1 April 2008, Dr. Boone wrote plaintiff out of work until 4 April 2008, at which time plaintiff could return to work in a position that allowed flexible sitting and standing while wearing an orthopedic boot. A 29 April 2008 note released plaintiff to return to work with the restrictions of no running or jumping, but allowed plaintiff to stand and walk.

After conducting an evidentiary hearing on 6 May 2008, the deputy commissioner entered an opinion and award on 12 February 2009 denying plaintiff's claim. Plaintiff appealed to the Full Commission on 23 March 2009. On 16 July 2009, the Full Commission entered its opinion and award affirming the deputy commissioner's decision with minor modifications. In denying plaintiff's claim, the Commission found that "[t]here was no unusual or unforeseen circumstance that interrupted [plaintiff's] work routine" and that although the incident on 20 November 2007 "was the cause of the Plaintiff's tendon injury, the incident . . . was not an accident within the meaning of the Workers' Compensation Act." Based on this ultimate finding, the Commission concluded that "there was no interruption of Plaintiff's work routine by an unlooked for event, and where Plaintiff was performing his normal job in the usual manner when his injury was sustained, there was no compensable accident." The Commission, consequently, denied plaintiff's claim for benefits. On 27 July 2009, plaintiff filed a motion for additional findings of fact, claiming that the Commission had failed to address "the evidence that plaintiff was unaware of his proximity to the downward slope of the crosswalk and unexpectedly stepped backward, onto its angled edge." The Commission denied plaintiff's motion on 27 August 2009, and plaintiff timely appealed to this Court from the Commission's opinion and award.

Discussion

Appellate review of a decision by the Industrial Commission is limited to "reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). As the fact-finding body, " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Id.* at 115, 530 S.E.2d at 552 (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998)). The Commission's findings of fact are thus conclusive on appeal when supported by competent evidence,

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

despite evidence in the record that would support contrary findings. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). Consequently, the Commission's findings may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). The Commission's conclusions of law are, however, reviewed de novo. *McRae*, 358 N.C. at 496, 597 S.E.2d at 701.

Plaintiff contends that the Commission erred in concluding that plaintiff did not sustain an injury by accident on 20 November 2007. A plaintiff is entitled to compensation for an injury under the Workers' Compensation Act "only if (1) it is caused by an 'accident,' and (2) the accident arises out of and in the course of employment." *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002); N.C. Gen. Stat. § 97-2(6) (2009). The plaintiff bears the burden of proving both elements of the claim. *Morrison v. Burlington Industries*, 304 N.C. 1, 13, 282 S.E.2d 458, 467 (1981). Neither party disputes that plaintiff's Achilles tendon injury arose out of and in the course of his employment with RDU. Rather, the parties dispute whether the manner in which plaintiff's injury occurred constitutes an "accident" within the meaning of the Workers' Compensation Act.

The terms "accident" and "injury" are separate and distinct concepts, and there must be an "accident" that produces the complained-of "injury" in order for the injury to be compensable. *O'Mary v. Clearing Corp.*, 261 N.C. 508, 510, 135 S.E.2d 193, 194 (1964). An "accident" is an "unlooked for event" and implies a result produced by a "fortuitous cause." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 106 (1991) (internal citation and quotation marks omitted). "If an employee is injured while carrying on [the employee's] usual tasks in the usual way the injury does not arise by accident." *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986). In contrast, when an interruption of the employee's normal work routine occurs, introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred. *Id.* The "essence" of an accident is its "unusualness and unexpectedness" *Smith v. Creamery Co.*, 217 N.C. 468, 472, 8 S.E.2d 231, 233 (1940).

Thus, in order to be a compensable "injury by accident," the injury must involve more than the employee's performance of his or her usual and customary duties in the usual way. *Renfro v. Richardson Sports Ltd. Partners*, 172 N.C. App. 176, 180, 616 S.E.2d

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

317, 322 (2005), *disc. review denied*, 360 N.C. 535, 633 S.E.2d 821 (2006). Moreover, “once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee’s normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an ‘injury by accident’ under the Workers’ Compensation Act.” *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985).

In determining that plaintiff’s Achilles tendon injury was not an injury by accident, the Commission found:

3. Plaintiff worked for Defendant-employer as a traffic control officer. Plaintiff was responsible for monitoring and controlling vehicular traffic around the airport’s terminals. Plaintiff’s responsibilities included stopping traffic to allow pedestrians to cross the roadway that separated the terminals from the airport’s parking lots. All of his duties required him to stand or walk. He was not permitted to sit while on duty, and spent his entire work shift on his feet.

. . . .

16. Plaintiff’s recorded statement shows that on [20 November 2007], he stepped back in the crosswalk. This was a maneuver he would make as a normal part of his job duties. Walking and directing traffic from the crosswalk was part of his normal job duties, as was stepping forward and backward in the crosswalk. Plaintiff mainly worked in the crosswalk, but he sometimes stepped up onto the sidewalk or off the crosswalk into the roadway. The incline change was usually behind him and he was normally facing traffic. It was not unusual for Plaintiff to step back in the crosswalk as often as two or three times an hour.

17. The greater weight of the evidence shows that the Plaintiff did not trip or fall when he injured his Achilles tendon on November 20, 2007. There was no unusual or unforeseen circumstance that interrupted his work routine. . . . [W]hile this action was the cause of the Plaintiff’s tendon injury, the incident . . . was not an accident within the meaning of the Workers’ Compensation Act.

Based on its findings, the Commission concluded that “there was no interruption of Plaintiff’s work routine by an unlooked for event, and where Plaintiff was performing his normal job in the usual manner when his injury was sustained, there was no compensable accident.”

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

In arguing for reversal of the Commission's decision, plaintiff claims that his "misstep"—"stepping backward and unknowingly stepping from the crosswalk's flat surface onto its uneven, angled surface"—was not a part of his normal work routine, but rather was an unexpected or unlooked-for event. Plaintiff argues that the Commission failed to address this "critical issue" in its findings of fact and conclusions of law, pointing to his evidence indicating that, at the time of the incident, he was unaware of his relative position within the crosswalk and that when he stepped out of the way for the crossing pedestrians, he "unknowingly and unexpectedly" stepped from the flat portion of the crosswalk onto the sloped portion.

Plaintiff contends that this evidence requires reversal under *Konrady v. U.S. Airways, Inc.*, 165 N.C. App. 620, 626, 599 S.E.2d 593, 587 (2004), where this Court upheld the Commission's determination that the plaintiff in that case suffered an "injury by accident" when she jarred her knee exiting a van that had pulled up closer than normal to the curb so that the bottom step overlapped the curb and the bottom step was shorter than other steps. Plaintiff overlooks the significance of the standard of review in workers' compensation cases. Because the Commission concluded in *Konrady* that the plaintiff had, in fact, suffered an injury by accident, the issue was whether there was competent evidence in the record to support the Commission's findings of fact and whether those findings, in turn, supported its conclusions of law. The *Konrady* Court concluded that there was competent evidence supporting the Commission's findings that "the van pulling closer to the curb and the shorter distance between the bottom step and the ground were an unforeseen circumstance and unusual condition and that [the plaintiff] could not recall ever before having encountered that situation." *Id.* at 626, 599 S.E.2d at 597.

In addressing whether the Commission's findings supported its conclusion that the plaintiff had suffered an injury by accident, the Court in *Konrady* reasoned:

[T]he issue is not whether exiting vans is routine for [the plaintiff], . . . but *whether something happened as she was exiting that particular van on that specific occasion that caused her to exit the van in a way that was not normal. Were there any unexpected conditions resulting in unforeseen circumstances?* Here, the unexpected conditions found by the Commission included a step that was shorter than other steps and the overlapping of the step with the curb. The unforeseen cir-

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

cumstances found by the Commission were that the step down from the van was much shorter than [the plaintiff] anticipated, causing her to “misstep” and hit the ground harder than she expected.

Id. (emphasis added).

Here, the competent evidence supports the Commission’s finding that “[t]here were no unusual or unforeseen circumstances that interrupted [plaintiff’s] work routine.” In addition to his testimony that his normal work routine involved standing, walking, and directing traffic, plaintiff also testified that during an eight hour shift, he spent roughly an hour working in the crosswalk. When he was working in the crosswalk, which is shaped like a speed bump, he normally stood “approximately 75% from the front of the crosswalk” so that pedestrians could not walk behind him. He was trained to stand facing traffic so that the downward slope of the crosswalk was “about a foot, foot and half” behind him. Plaintiff also testified that when he stepped out of the way to let pedestrians cross, he “would often have to step back further than that quarter space” and that he would often “step[] back onto the level surface and the gradual surface” of the crosswalk. Thus, unlike the plaintiff in *Konrady*, plaintiff’s own testimony indicates that he previously had “encountered th[is] situation” as part of his normal work routine. 165 N.C. App. at 626, 599 S.E.2d at 597; *Bowles*, 77 N.C. App. at 550, 335 S.E.2d at 504.

Although plaintiff characterizes the incident as a “misstep,” his testimony indicates that he routinely would have to step backward off the flat portion of the crosswalk and, in doing so, he would often step onto the inclined section. This evidence supports the Commission’s finding that there was no unusual or unforeseen circumstance interrupting plaintiff’s normal work routine when he sustained the injury to his Achilles tendon. See *Landry v. U.S. Airways, Inc.*, 150 N.C. App. 121, 126, 563 S.E.2d 23, 27 (Hunter, J., dissenting) (holding that Commission’s finding that plaintiff’s normal work routine was not interrupted by an unusual or unforeseen circumstance when he injured his shoulder lifting a mail bag that was heavier than expected was supported by evidence showing that “plaintiff’s job required him to lift weights of up to 400 pounds; that plaintiff never knew prior to lifting mailbags how much they weighed; that it was not unusual for mailbags to be extremely heavy and that plaintiff would be unaware of the heavy weight of the bags until he lifted them; and that plaintiff was engaged in his normal duties and using his normal

GRAY v. RDU AIRPORT AUTH.

[203 N.C. App. 521 (2010)]

motions when injured”), *rev’d per curiam for reasons stated in the dissent*, 356 N.C. 419, 571 S.E.2d 586 (2002).

Plaintiff, moreover, testified that during the incident on 20 November 2007, nothing hit him or tripped him, causing him to take the “misstep” backward. He also stated that there was “nothing wrong” with the crosswalk on 20 November 2007. During a recorded interview to determine whether plaintiff was eligible for workers’ compensation benefits, plaintiff was asked whether “anything unusual or out of the ordinary happened while [he] w[as] stepping back . . . ?” Plaintiff responded: “The pain in the back of my leg.” As the Supreme Court has explained, however, for the injury to be accidental in nature, “there must be some unforeseen or unusual event other than the bodily injury itself.” *Rhinehart v. Market*, 271 N.C. 586, 588, 157 S.E.2d 1, 3 (1967).

The evidence in this case supports the Commission’s ultimate finding that there were no unusual or unforeseen circumstances interrupting plaintiff’s work routine, which, in turn, supports the Commission’s conclusion that “there was no compensable accident.” Thus, contrary to plaintiff’s argument, the Commission did not fail to make sufficient findings of fact and conclusions of law with respect to whether plaintiff’s Achilles tendon injury was an “injury by accident” under the Workers’ Compensation Act.

Plaintiff nonetheless argues that the “‘accidental’ character of an injury is measured from the perspective of the injured employee” and “not from ‘quantifiable’ considerations” regarding an employee’s normal work routine. Thus, plaintiff maintains, because he did not intend to “misstep,” his injury is the result of an accident. In support of his argument, plaintiff relies primarily on *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), where the Supreme Court held that, “[f]rom the standpoint of the injured party, an injury intentionally inflicted by another can . . . be an ‘unlooked for and untoward event . . . not expected or designed by the injured employee.’” *Id.* at 349, 407 S.E.2d at 233 (quoting *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E.2d 109, 110 (1962) (first alteration and emphasis added)).

Plaintiff misreads *Woodson*. The *Woodson* Court did not hold that the accidental nature of an employee’s injury is to be determined from the subjective perspective of the employee, as plaintiff suggests, but rather that in cases involving intentional torts resulting in an injury to an employee, “the injury . . . is considered to be both by acci-

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

dent, for which the employee . . . may pursue a compensation claim under the Act, and the result of an intentional tort, for which a civil action against the employer may be maintained.” *Id.* at 339, 407 S.E.2d at 227. In the portion of *Woodson* relied upon by plaintiff, the Court was simply explaining that it is “not inherently inconsistent to assert that an injury caused by the same conduct [i]s both the result of an accident, giving rise to the remedies provided by the Act, and an intentional tort, making the exclusivity provision of the Act unavailable to bar a civil action.” *Id.* at 349, 407 S.E.2d at 233. In short, nothing in *Woodson* supports plaintiff’s argument.

Plaintiff’s contention that the “accidental character” of an injury is to be assessed from the subjective perspective of the employee posits a fundamentally different test for an “injury by accident” than the one used by our courts in construing the Workers’ Compensation Act. Following plaintiff’s argument to its logical conclusion, there would practically never be a non-compensable injury so long as it arose out of and in the course of employment: no employee expects to get injured on the job. Adopting plaintiff’s argument would effectively render N.C. Gen. Stat. § 97-2(6)’s requirement that the injury be caused “by accident” superfluous since virtually every injury would be accidental from the point of view of the injured employee. *But see Harding*, 256 N.C. at 428, 124 S.E.2d at 110 (“The North Carolina Work[ers]’ Compensation Act does not provide compensation for injury, but only for injury by accident.”). Plaintiff’s argument is thus overruled.

Affirmed.

Judges CALABRIA and HUNTER, Robert N., Jr. concur.

STATE OF NORTH CAROLINA v. JOHN ANTHONY HOLCOMBE, AND
DANNY RAY HOLCOMBE

No. COA09-860

(Filed 20 April 2010)

1. Assault— in secret—evidence not sufficient

The trial court erred by not dismissing a charge of malicious secret assault for insufficient evidence where the State did not present evidence that the victims were unaware of defendants’

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

purpose prior to the attack, that defendants intended to be furtive in their assault, or that the victims were surprised. In fact, the State's own evidence contradicted the secret manner element of the offense.

2. Aiding and Abetting—evidence not sufficient—evidence of principal crime not sufficient

There was insufficient evidence to support a conviction for aiding and abetting malicious secret assault where the State did not produce sufficient evidence of the principal crime.

Appeal by defendants from judgments entered 12 February 2009 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 12 January 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Barry H. Bloch, for the State (JAH).

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General V. Lori Fuller, for the State (DRH).

Hylar & Lopez, P.A., by George B. Hylar, Jr. and Robert J. Lopez, for defendants-appellants.

JACKSON, Judge.

Danny Ray Holcombe (“Danny”) appeals his 11 February 2009 convictions for malicious assault in secret, assault with a deadly weapon, injury to personal property, carrying a concealed weapon, and assault and battery. John Anthony Holcombe (“John”) (collectively with Danny, “defendants”) appeals his 11 February 2009 conviction of aiding and abetting malicious assault in secret. For the reasons stated below, we vacate both Danny’s conviction for malicious assault in secret and John’s conviction for aiding and abetting malicious assault in secret.

In July 2008 Michelle McElrath (“McElrath”) knew that her uncle by marriage, Danny, was seeking oxycontin pills and that her friend Jamie Woody (“Woody”) had access to oxycontin. She set up a meeting between them. On or about 8 July 2008, Woody, Brian Mull (“Mull”), and Jonathan Mintz (“Mintz”) (collectively “accusers”) drove in Mull’s Mustang (“the Mustang”) to Danny’s home. Woody left his wallet at the home and Mintz stayed behind as well, so that Danny would know that Woody “wasn’t going to rip him off.” Mull and Woody then took Danny’s \$450.00 and drove to pick up the oxy-

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

contin. While in transit, Woody learned that the friend from whom he had planned to purchase the oxycontin no longer had it available. Mull and Woody returned to Danny's home, gave him his money back, and left.

Later that day, Woody, Mull, and Mintz decided to "tell Danny we can get some pills . . . [and] get more money out of him." According to Woody, "I didn't intend on getting him my pills. I intended on taking his money and going out of town to work." Woody called Danny, went with Mull and Mintz back to his house, and collected \$660.00 from him. This time, Woody did not leave his wallet, and Mintz, as planned, pretended to have forgotten his cigarettes, left the home, and jumped into the Mustang as it "sped off." Danny called Woody numerous times over the next week, and according to Woody, made statements such as, "Oh, your money ain't going to help you now. You're mine, son[.]"

On 22 July 2008, McElrath called Woody and asked him to drive her to a relative's house in order for her to borrow money; she said she would give him \$20.00 for gas. Mintz testified that he "didn't feel right when [McElrath] called" for a ride. Using the Mustang, Woody, Mull, and Mintz dropped McElrath off and drove to High Street Church ("the church") where she had told them to wait for her. Woody "knew something kind of sounded fishy" so he "told [Mull] to back [the Mustang] in. That way [he] could watch the street[.]" According to Woody, "there had been rumors—Danny threatening to get us. So when you're in Canton after you done ripped a man off in Canton, you've got to watch your back at all times."

When the accusers dropped McElrath off, she called Danny to tell him where to find them. After they received McElrath's phone call, both defendants and John's girlfriend traveled in Danny's SUV to the church. Danny also called another brother, Donald Holcombe ("Donald"), to go with them to the church in his truck.

After the accusers had been waiting in the church parking lot for five to ten minutes, an SUV and a truck pulled in and attempted to block the Mustang from the front and from behind. Woody "recalled that SUV that Danny drove, so [he] knew it was Danny." John exited the SUV with a baseball bat. Woody then "hollered that it was Danny" and Mull "pulled [the Mustang] back far enough to where [he] could clear the front vehicle and then took off." Danny sped after them in his SUV down High Street, so John jumped into the truck with Donald and they followed.

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

As the Mustang drove away, it was forced to stop for a gold truck that was backing into a driveway. When it stopped, Danny rammed his SUV into the Mustang. Once the accusers resumed driving, they began to turn right onto Reservoir Road when Danny again hit the Mustang with his SUV. The Mustang began to fishtail and ran into a tree. Danny's SUV then ran into the Mustang again. The Mustang's air bags deployed.

After the crash, Mull got out of the driver's side door, saw Danny "pushing his [car] door open with a pistol," and heard Danny say that he was going to shoot them. Mull was scared and ran down Reservoir Road. Woody also got out of the Mustang, saw Danny with a gun, and ran down Carson Street. Woody ran to a former neighbor's house and called 911. Mintz was in the backseat of the Mustang and hit his head on the ceiling during the collision. Both Mull and Woody were gone when Mintz recovered from the stun. Mintz exited the Mustang and saw Danny pointing a gun at him. Danny yelled at Mintz and hit him in the eye with either his left hand or the gun. Mintz felt blood running down his face, so he got up, ran down the road, and caught up with Mull.

John and Donald arrived in the truck and drove after Mull and Mintz. Police officers then arrived at the scene. Mull, Mintz, and Woody were taken to the hospital. Several witnesses corroborated the car chase, the wreck, and the subsequent fight between Danny and Mintz. One witness also testified that, following the wreck, John's girlfriend exited the SUV with two baseball bats.

On 29 September 2008, Danny was indicted on one count of malicious assault in secret, three counts of assault by pointing a gun, three counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of injury to personal property, one count of carrying a concealed weapon, and one count of assault and battery. On the same date, John was indicted on one count of felony aiding and abetting secret assault. On 11 February 2009, a jury convicted Danny of one count of malicious secret assault, one count of assault with a deadly weapon, one count of injury to personal property, one count of carrying a concealed weapon, and one count of assault and battery; he was found not guilty of the other charges. John was convicted of felony aiding and abetting the crime of secret assault. Defense counsel did not raise an objection to the verdicts when rendered or at sentencing. Defendants appeal.

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

[1] Defendants filed a joint brief with this Court. However, their first, fourth, and fifth arguments pertain only to Danny, and their second, third, sixth, and seventh arguments pertain only to John. We first address defendants' arguments that the trial court erred by denying Danny's motion to dismiss the charge of malicious secret assault based upon a lack of sufficient evidence. We agree.

Our Supreme Court previously has summarized the standards we use when evaluating a motion to dismiss:

The rules governing motions to dismiss in criminal cases are well settled and familiar. When a defendant moves for dismissal, the trial judge must determine whether there is "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the crime." The term "substantial evidence" is deceptive because, as interpreted by this Court in the context of a motion to dismiss, it is interchangeable with "more than a scintilla of evidence." Thus, the true test of whether to grant a motion to dismiss is whether the evidence, considered in the light most favorable to the State, is "existing and real, not just seeming or imaginary." If the evidence will permit a reasonable inference that the defendant is guilty of the crime charged, the trial judge should allow the case to go to the jury. This is true whether the evidence is direct, circumstantial or both.

State v. Faison, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991) (internal citations omitted). Additionally, "'defendant's evidence, unless favorable to the State, is not to be taken into consideration[.]'" *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quoting *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971)).

The North Carolina General Statutes, section 14-31 defines malicious assault in a secret manner:

If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class E felon.

N.C. Gen. Stat. § 14-31 (2007). The crime of maliciously assaulting in a secret manner ("malicious secret assault") consists of five elements: (1) secret manner, (2) malice, (3) assault and battery, (4) deadly weapon, and (5) intent to kill. *See State v. Hill*, 287 N.C. 207,

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

214 S.E.2d 67 (1975) and *State v. Green*, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Here, defendants do not challenge the sufficiency of the State's evidence as to the elements of malice, assault and battery, and deadly weapon. Therefore, we confine our analysis to the elements of secret manner and intent to kill.

We previously have held that “[r]egarding defendant’s ‘secret manner,’ the victim does not have to be aware of the defendant’s presence, but it is necessary that the victim not know the defendant’s purpose.” *Green*, 101 N.C. App. at 321, 399 S.E.2d at 379 (citing *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924)). We believe that the *Green* Court was unclear in its restatement of *Oxendine*’s original rule that it “is not essential to a conviction for a secret assault . . . that the person assaulted should be unconscious of the presence of his adversary[.]” *State v. Oxendine*, 187 N.C. 658, 663, 122 S.E. 568, 571 (1924). The body of case law that addresses the secret manner element of malicious secret assault reinforces that, if the victim is unaware of the defendant’s presence, then the assault is a secret one, because if one’s presence is unknown, then his purpose to assault necessarily also is unknown. If a defendant’s presence is known but the purpose underlying the assault is not, our courts have held that that also satisfies the secret manner element. Therefore, we believe that the *Green* Court simply intended to note that, regardless of whether the victim is aware of the defendant’s presence, he cannot know of the defendant’s purpose to assault him in order for the assault to be committed in a secret manner.

We previously have noted that “[i]n the context of an assault case, ‘lying in wait’ [or secret manner] is nothing more or less than taking the victim by surprise[.]” *State v. Puckett*, 66 N.C. App. 600, 604-05, 312 S.E.2d 207, 210 (1984). “Although concealment is not a necessary element . . . , it is clear from this Court’s prior decisions that some sort of ambush and surprise of the victim are [sic] required.” *State v. Lynch*, 327 N.C. 210, 218, 393 S.E.2d 811, 816 (1990). “‘Even a moment’s deliberate pause before [assaulting] one unaware of the impending assault and consequently ‘without opportunity to defend himself’ satisfies the definition’” *Id.* (quoting *State v. Leroux*, 326 N.C. 368, 376, 390 S.E.2d 314, 320 (1990)). Important considerations for the secret manner element center on the suddenness of the attack, see, e.g., *Lynch*, 327 N.C. at 217-18, 393 S.E.2d at 815-16, and the inability of the victim to defend himself, see, e.g., *State v. Bridges*, 178 N.C. 733, 738, 101 S.E. 29, 32 (1919).

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

Our case law provides a number of examples of what constitutes taking a victim by surprise, thereby fulfilling the secret manner element of malicious secret assault: a defendant who poisoned her husband's coffee at breakfast, *State v. Alderman*, 182 N.C. 917, 110 S.E. 59 (1921); a defendant who shot a police officer in the dark as he rounded a corner, *Bridges, supra*; a defendant who struck the victim from behind with a large stick, *State v. Harris*, 120 N.C. 577, 26 S.E. 774 (1897); and most recently, a defendant who shot the victim from within a wooded area, *Green, supra*.

Cases that address murder by lying in wait also may be instructive as to malicious secret assault. See *State v. Joyner*, 329 N.C. 211, 217, 404 S.E.2d 653, 656-57 (1991) (noting that the crimes of malicious secret assault and murder by lying in wait include the same underlying actions but differ in that the former does not result in a death while the latter does). Examples of murder by lying in wait—in which the “lying in wait” element was challenged and the State’s evidence found sufficient—include a defendant who intentionally remained out of the victim’s sight and waited until the victim left a store before attacking her, *State v. Richardson*, 346 N.C. 520, 536-37, 488 S.E.2d 148, 158 (1997); a defendant who hid inside a house before shooting the victim, *State v. Aikens*, 342 N.C. 567, 574, 467 S.E.2d 99, 103-04 (1996); a defendant who concealed himself on a dark golf course and fired a gun at police officers, *State v. Leroux*, 326 N.C. 368, 376-77, 390 S.E.2d 314, 320-21 (1990); and a defendant who was concealed behind a bush and shot the victim, *State v. Hocutt*, 177 N.C. App. 341, 352, 628 S.E.2d 832, 840 (2006).

These cases are similar to each other in several respects. For most of the victims, their first awareness of potential danger occurred simultaneously with the assaults themselves. Also, most of the defendants were concealed and waiting for their victims prior to the victims’ arrival at the scene. Finally, each defendant took some deliberate action to disguise either his presence or his purpose from the victim. All of these factors indicate that the victims were taken by surprise and were unable to defend themselves from the assaults.

In the instant case, the State has not presented any evidence that Woody, Mull, and Mintz were unaware of defendants’ purpose prior to the attack nor that defendants intended to be furtive in their assault. The State’s brief merely asserts that McElrath acted as an accomplice in luring the accusers to the church parking lot and that defendants drove into the parking lot where they “surprised and surrounded the victims’ car[.]” However, the citations to the transcript that the State

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

provided for this statement include no testimony that Woody, Mull, or Mintz was surprised by defendants' arrival in the parking lot. The State's brief also lacks any argument that defendants attempted to be furtive in their approach of the Mustang and its occupants. Although the State is due the benefit of every reasonable inference, the State has presented no evidence or argument that this assault was committed in a secret manner.

In fact, the State's own evidence contradicts the secret manner element of the offense. Woody and Mintz clearly testified that "something kind of sounded fishy" and that they "didn't feel right" about the situation. When McElrath asked Woody to give her a ride, he responded, "Yeah. I'll take you as long as it's not a setup." Based upon earlier threats from Danny and what the accusers felt were dubious circumstances, Woody even "told [Mull] to back [the Mustang] in. That way [he] could watch the street[.]" Woody also acknowledged that "there had been rumors—Danny threatening to get us. So when you're in Canton after you done ripped a man off in Canton, you've got to watch your back at all times."

Furthermore, although McElrath testified that she called defendants in order for them to have the opportunity to take revenge, she never stated that defendants asked her to set this trap. Danny had called Woody often in the weeks prior to the assault, and he had threatened him. Defendants drove into the parking lot in broad daylight, and John jumped out of the SUV with a baseball bat. Defendants did not conceal themselves somewhere to wait, and they did not plan an attack to occur in the dark or from behind. Nothing about defendants' actions was secretive either as to their presence or as to their purpose to assault Woody, Mull, and Mintz.

Finally, the accusers here were inside a car when defendants arrived, and John got out of the SUV in order to pursue them with a baseball bat. Woody, Mull, and Mintz were aware of both the presence and the purpose of defendants in time to defend themselves by escaping and prior to any assault. Also, even if, contrary to their testimonies, the accusers were surprised when defendants arrived at the parking lot, by the time Danny rammed his SUV into the Mustang, they were well-aware that an assault could happen. The State has presented no evidence that Woody, Mull, or Mintz was surprised, that they had no opportunity to defend themselves, or that defendants took steps to make the assault secretive.

STATE v. HOLCOMBE

[203 N.C. App. 530 (2010)]

Our case law unequivocally requires that the victim be caught unaware in order for the secret manner element of malicious secret assault to be satisfied. See *Oxendine*, 187 N.C. at 663, 122 S.E. at 571 (“It is not essential to a conviction for a secret assault, under the statute as now written,¹ that the person assaulted should be unconscious of the presence of his adversary; but his purpose must not be known, for in that event the assault would not have been committed in a secret manner.”) (citation omitted) and *Lynch*, 327 N.C. at 218, 393 S.E.2d at 816 (“[I]t is clear from this Court’s prior decisions that some sort of ambush and surprise of the victim are [sic] required.”). Although the State attempts to analogize the current facts with those of *Hill*, *supra* (defendant asked another inmate to lure a prison guard to a mop room, where defendant was waiting to beat the guard with a mop handle), our research has disclosed no case addressing malicious secret assault that is in any way similar to a car chase in broad daylight following weeks of threats and accusers’ own apprehension that an assault from defendant was possible.

The State also suggests in its brief that during the car chase, Woody, Mull, and Mintz “had no way of knowing that the defendant was actually going to ram their car with his vehicle” and that that fact would support the secret manner element of the charged offense. However, when a person is confronted with a deadly weapon, especially in the midst of a hostile confrontation with an antagonistic party, the opposing party does not act secretly when he subsequently uses that deadly weapon to perpetrate a battery. Even affording the State the benefit of every reasonable inference, the evidence simply is not sufficient to support the secret manner element of malicious secret assault. Therefore, we must hold that the trial court erred in denying Danny’s motion to dismiss because the State did not produce substantial evidence as to the element of secret manner. We vacate his conviction for malicious secret assault.

Because we have vacated Danny’s conviction for malicious secret assault based upon a lack of evidence as to secret manner, we do not address his argument as to the intent to kill element.

[2] Defendants’ final argument is that insufficient evidence was before the trial court to support John’s conviction for aiding and abetting malicious secret assault. We agree.

1. The operative language of the current statute that prohibits malicious secret assault, North Carolina General Statutes, section 14-31, matches verbatim with the 1924 statute as set forth in *Oxendine*, 187 N.C. at 663, 122 S.E. at 570-71.

IN RE T.D.W.

[203 N.C. App. 539 (2010)]

The standard for reviewing a motion to dismiss based upon insufficiency of the evidence is discussed *supra*. See *Faison*. Although it is not defined by our statutes, our Supreme Court has upheld three elements of the crime of aiding and abetting: “(1) that the [principal] crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant’s actions or statements caused or contributed to the commission of the [principal] crime by the other person.” *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996) (citing *State v. Francis*, 341 N.C. 156, 161, 459 S.E.2d 269, 272 (1995)).

Here, the State did not provide sufficient evidence of the first element of aiding and abetting—that the principal crime was committed by another—because, as discussed previously, there existed insufficient evidence that Danny committed the crime of malicious secret assault. Accordingly, the trial court erred by denying John’s motion to dismiss his aiding and abetting charge, and we vacate that conviction.

Because we vacate Danny’s conviction for malicious secret assault and John’s conviction for aiding and abetting malicious secret assault based upon a lack of sufficient evidence as to each element of the charged crimes, we do not address defendants’ remaining arguments.²

Vacated.

Judges McGEE and HUNTER, Jr. concur.

IN THE MATTER OF: T.D.W., MINOR CHILD

No. COA09-1519

(Filed 20 April 2010)

Termination of Parental Rights— late service of notice—timeliness of hearing—harmless error

The trial court did not err by terminating respondent mother’s parental rights. There was no indication that respondent was in any way prejudiced by the fact that notice of the 8 July 2009 hear-

2. None of defendants’ arguments challenge Danny’s remaining convictions for assault with a deadly weapon, injury to personal property, carrying a concealed weapon, and assault and battery. We do not disturb those convictions by vacating his conviction for malicious secret assault.

IN RE T.D.W.

[203 N.C. App. 539 (2010)]

ing was sent on 18 June 2009 instead of 17 May 2009. A failure to mechanically comply with N.C.G.S. § 7B-1106.1 is subject to harmless error analysis. Further, respondent waived the right to object to any deficiencies based on the failure of her trial counsel to lodge a notice—based objection during the course of that hearing. Finally, although the hearing started at 12:17 pm instead of 9:00 am as listed on the notice, there was no indication that respondent appeared at the specified time or at any other time, and the record suggested the timing was to accommodate her trial counsel's scheduling conflicts.

Appeal by Respondent-Mother from order entered 24 August 2009 by Judge Don W. Creed, Jr., in Randolph County District Court. Heard in the Court of Appeals 22 March 2010.

Erica Glass McDoe for Randolph County Department of Social Services, petitioner-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Heather Adams and Katherine Y. Lavole, for guardian ad litem-appellee.

Betsy J. Wolfenden for mother, respondent-appellant.

ERVIN, Judge.

Respondent-Mother Crystal M. appeals from an order entered by the trial court terminating her parental rights in the minor child T.D.W. (Thomas).¹ On appeal, Respondent-Mother challenges the timeliness and accuracy of the notice that she received pursuant to N.C. Gen. Stat. § 7B-1106.1(b)(5). After careful consideration of Respondent-Mother's contentions in light of the record and the applicable law, we conclude that no prejudicial error occurred in the proceedings leading to the entry of the trial court's termination order and that, for that reason, it should be affirmed.

On 19 July 2006, the Randolph County Department of Social Services filed a juvenile petition alleging that Thomas was a dependent juvenile. On the same day, DSS obtained non-secure custody of Thomas.

On 28 September 2006, the trial court held an adjudication hearing on the juvenile petition. On that date, the trial court rendered an order in open court adjudicating Thomas to be a dependent juvenile

1. "Thomas" is a pseudonym that will be used for the minor child throughout the remainder of this opinion for ease of reading and in order to protect his privacy.

IN RE T.D.W.

[203 N.C. App. 539 (2010)]

and placing him in the custody of DSS. The written order to this effect was filed on 15 October 2007.

On 13 June 2007, the trial court held a permanency planning hearing. The permanent plan adopted for Thomas by the court included reunification with Respondent-Mother. Although reunification remained the permanent plan for an extended period of time, the trial court ceased efforts toward reunifying Thomas with Respondent-Mother and modified the permanent plan to adoption in an order that was announced in open court on 29 October 2008 and entered on 23 February 2009 after a trial home placement proved unsuccessful.

On 13 April 2009, DSS filed a motion to terminate Respondent-Mother's parental rights in Thomas. On 8 July 2009, the trial court held a hearing on the motion to terminate parental rights. Although Respondent-Mother did not appear at the hearing held in connection with the termination motion, her attorney did not lodge any objection to the notice that Respondent-Mother had received at the termination proceeding. The trial court entered an order on 24 August 2009 terminating Respondent-Mother's parental rights in Thomas. On 18 September 2009, Respondent-Mother noted an appeal to this Court from the trial court's termination order.²

Respondent-Mother's sole argument on appeal is that the trial court erred, abused its discretion and violated her constitutional right to due process in terminating her parental rights in Thomas by virtue of the fact that notice of the termination hearing was not timely served and the notice was defective. More specifically, Respondent-Mother contends that the present termination proceeding was not conducted in compliance with N.C. Gen. Stat. § 7B-1106.1 (2009), because DSS did not mail notice of the termination hearing in a timely manner and because the notice provided an incorrect time for the 8 July 2009 termination hearing.

If a termination proceeding is initiated by motion, then the movant is required to prepare a notice directed to the parents of the juvenile which contains the following information:

- (1) The name of the minor juvenile.
- (2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.

2. The trial court's order also terminated Respondent-Mother's parental rights in two other minor children, B.A.A.M. and T.E.W. According to a stipulation contained in the record on appeal, Respondent-Mother is not challenging the trial court's decision to terminate her parental rights in B.A.A.M. and T.E.W. on appeal.

IN RE T.D.W.

[203 N.C. App. 539 (2010)]

- (3) Notice that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.
- (4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.
- (5) Notice that the date, time, and place of any pretrial hearing pursuant to [N.C. Gen. Stat. §] 7B-1108.1 and the hearing on the motion will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.
- (6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

N.C. Gen. Stat. §§ 7B-1106.1(a) and (b). “[S]ection 7B-1106.1 directs the *petitioner* to notify the respondent that proceedings to terminate his or her parental rights have been commenced and that a TPR hearing *will be held* at a future date.” *In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391 (emphasis in original), *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004).

The notice sent in conjunction with the Motion to Terminate Parental Rights to Respondent-Mother utilizes the language of N.C. Gen. Stat. § 7B-1106.1(b) and was served upon Respondent-Mother by certified mail sent to her last known address.³ An affidavit of service confirms that the Motion to Terminate Parental Rights and the notice required by N.C. Gen. Stat. § 7B-1106.1 was mailed to Respondent-Mother on 13 April 2009. As is evidenced by the affidavit of service, Respondent-Mother was served with the Motion to Terminate Parental Rights and the notice on 17 April 2009.⁴ On 18 June 2009, the

3. As a result of the fact that the language of the notice sent to Respondent-Mother on 13 April 2009 is couched in the language of N.C. Gen. Stat. § 7B-1106.1(b), *In re J.T.W.*, 178 N.C. App. 678, 683, 632 S.E.2d 237, 240 (2006), *rev'd on other grounds*, 361 N.C. 341, 643 S.E.2d 579 (2007), the contents of the notice mailed to Respondent-Mother on 13 April 2009 are legally sufficient, and Respondent-Mother does not appear to argue otherwise.

4. Respondent-Mother notes in her brief that the termination motion and the notice required by N.C. Gen. Stat. § 7B-1106.1(b) was served by certified mail addressed to her at 852 HR Holt Cir, Troy, NC 27371, and that “Elaine Williams signed for the motion.” According to Respondent-Mother, “[t]here is no evidence in the record that Elaine Williams resided at 852 HR Holt Cir, Troy NC 27371, with

IN RE T.D.W.

[203 N.C. App. 539 (2010)]

office of the Clerk of Superior Court of Randolph County sent Respondent-Mother a notice concerning the date, time and location of the termination hearing, which was set for 8 July 2009 at 9:00 a.m.⁵

Respondent-Mother first contends that the trial court's order terminating her parental rights in Thomas should be vacated because the notice of the "date, time, and place of the hearing" required by N.C. Gen. Stat. § 7B-1106.1(b)(5) was not sent to her in a timely manner. As a result of the fact that Respondent-Mother did not file a response to the termination motion, N.C. Gen. Stat. § 7B-1106.1(b)(5) provides that notice of the "date, time, and place" of the hearing be sent within "30 days from the date of service." As Respondent-Mother notes, the office of the Clerk of Superior Court of Randolph County did not send Respondent-Mother a notice that the hearing on the termination motion would be held at 9:00 a.m. on 8 July 2009 until 18 June 2009.⁶ Respondent-Mother argues that "[t]he use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error,"⁷ *In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300

Respondent[-]Mother or that Respondent-Mother received the motion." However, since Respondent-Mother has not cited any authority in support of her implicit claim that service of the notice and motion was improper; since N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) provides that an "affidavit together with the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt signed by the person who received the mail or delivery if not the addressee raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age or discretion residing in the addressee's dwelling house or usual place of abode;" and since the record does not reflect that any attempt was made to rebut the presumption established by N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2), we are not persuaded by Respondent-Mother's suggestion that the motion and notice required by N.C. Gen. Stat. § 7B-1106.1(a) were not properly served as required by N.C. Gen. Stat. § 7B-1102(b).

5. The record also reflects that the office of the Clerk of Superior Court sent Respondent-Mother a notice on 30 April 2008 indicating that a pretrial hearing would be held pursuant to N.C. Gen. Stat. § 7B-1108.1 on 20 May 2009. This notice was sent well within the time limitations specified by N.C. Gen. Stat. § 7B-1106.1(b)(5). DSS and the Guardian *ad Litem* have not contended that the sending of this notice constitutes full compliance with the requirements of N.C. Gen. Stat. § 7B-1106.1(b)(5), so we will assume, without deciding, that it does not.

6. Respondent-Mother does not challenge the fact that the 18 June 2009 notice was sent by the office of the Clerk of Superior Court of Randolph County rather than by DSS.

7. Interestingly enough, although the word "shall" appears in the language at the beginning of N.C. Gen. Stat. § 7B-1106.1(b) which describes the contents of the required notice, *In re J.L.K.*, 165 N.C. App. at 315, 598 S.E.2d at 390 (describing the requirement that a notice containing certain information be sent to the juvenile's par-

IN RE T.D.W.

[203 N.C. App. 539 (2010)]

(2005), citing *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001); *In re Johnson*, 76 N.C. App. 159, 331 S.E.2d 756 (1985); and *In re Wade*, 67 N.C. App. 708, 313 S.E.2d 862 (1984)), and that “[v]iolation of the clear mandate of a statute has been held by this Court to constitute reversible error *per se*.”

Respondent-Mother is clearly correct in arguing that the 18 June 2009 notice was not sent in a timely manner. As a result of the fact that Respondent-Mother did not file a response within 30 days of service of the notice and a copy of the motion seeking the termination of her parental rights in Thomas, the notice described in N.C. Gen. Stat. § 7B-1106.1(b)(5) should have been transmitted to her no later than 17 May 2009. For that reason, the notice that a hearing would be held on the termination motion on 8 July 2009 was sent to Respondent-Mother approximately 30 days later than contemplated by N.C. Gen. Stat. § 7B-1106.1(b)(5). The existence of this error in the proceedings leading up to the entry of the termination order does not, however, mandate the vacating of the termination order as Respondent-Mother suggests.

Although this Court has rejected the contention that a failure to strictly comply with the general notice requirement of N.C. Gen. Stat. § 7B-1106.1(b) can be excused on the grounds that the parent who did not receive the required notice was not prejudiced, *Alexander*, 158 N.C. App. at 525, 581 S.E.2d at 468-69; *In re D.A., Q.A., & T.A.*, 169 N.C. App. 245, 247-48, 609 S.E.2d 471, 472-73 (2005), it is clear from an examination of our opinions in those case that the error at issue there was either a total failure to provide the notice required by N.C. Gen. Stat. § 7B-1106.1(b) or a failure to provide important components of that notice required by N.C. Gen. Stat. § 7B-1106.1(b), rather than a failure to provide the subsequent notice required by N.C. Gen. Stat. § 7B-1106.1(b)(5). As a result, our decisions in *Alexander* and *D.A.* are not controlling on the issue of whether a failure to provide timely notice of the “date, time, and place of . . . the hearing on the motion” in accordance with N.C. Gen. Stat. § 7B-1106.1(b)(5) necessitates vacating a termination order entered in the absence of timely notice. Thus, contrary to Respondent-Mother’s contentions, we are not persuaded that a failure to provide notice of the date, time, and place of the hearing to be held in connection with a termination motion pur-

ents in a termination proceeding as “mandatory”); *see also In re Alexander* 158 N.C. App. 522, 524, 581 S.E.2d 466, 467-68 (2003) (referring to the “mandatory nature of the language employed in N.C. Gen. Stat. § 7B-1106.1”), the word “shall” does not appear in N.C. Gen. Stat. § 7B-1106.1(b)(5) itself.

IN RE T.D.W.

[203 N.C. App. 539 (2010)]

suant to N.C. Gen. Stat. § 7B-1106.1(b)(5) inevitably requires an award of appellate relief.

After careful consideration, we conclude that the failure to provide Respondent-Mother with notice of the date, time, and place of the hearing on the termination motion on or before 17 May 2009 pursuant to N.C. Gen. Stat. § 7B-1106.1(b)(5) does not necessitate an award of appellate relief in this case for two different, albeit related, reasons. First, there is no indication in the present record that Respondent-Mother was in any way prejudiced by the fact that notice of the 8 July 2009 hearing was sent on 18 June 2009 instead of 17 May 2009. We see no reason why a failure to mechanically comply with N.C. Gen. Stat. § 7B-1106.1(b)(5) should not be subject to harmless error analysis, see *In re Huff*, 140 N.C. App. 288, 298, 536 S.E.2d 838, 845 (2000), *disc. review denied and appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001) (holding that, “even assuming *arguendo* that the trial court erred in allowing any religious inquiry, such error was not prejudicial because there is no indication that the testimony impacted the trial court’s decision”), particularly given the absence from N.C. Gen. Stat. § 7B-1106.1(b)(5) of the mandatory language found in other portions of N.C. Gen. Stat. § 7B-1106.1. Under established standards for conducting harmless error review, we are unable to conclude that Respondent-Mother was prejudiced by the late service of the notice required by N.C. Gen. Stat. § 7B-1106.1(b)(5).

Prior to the filing of the termination motion, Respondent-Mother was aware that the permanent plan for Thomas was adoption and that it would be necessary for DSS to seek to have her parental rights in Thomas terminated in order to implement that permanent plan. On 17 April 2009, a copy of the termination motion required by N.C. Gen. Stat. § 7B-1106.1(b) was received at Respondent-Mother’s last known address. On 30 April 2009, the office of the Clerk of Superior Court of Randolph County sent Respondent-Mother a notice that a pretrial hearing would be held on 20 May 2009. Similarly, on 18 June 2009, the Clerk’s office sent Respondent-Mother a notice that the termination hearing would be held on 8 July 2009. Even so, Respondent-Mother did not appear on 8 July 2009, and her trial counsel informed the trial court that he had not heard from her in months. Furthermore, Respondent-Mother has not made any attempt to demonstrate how she was handicapped in either attending or presenting evidence at the 8 July 2009 hearing given the nature of the notice that she actually received. Given this set of circumstances and the relatively undisputed nature of the evidence presented by DSS in support of the ter-

IN RE T.D.W.

[203 N.C. App. 539 (2010)]

mination motion, we cannot see how Respondent-Mother was prejudiced by the fact that notice of the 8 July 2009 hearing was sent to her on 18 June 2009 rather than 17 May 2009.

Secondly, this Court held in *In re J.S.L.*, 177 N.C. App. 151, 155, 628 S.E.2d 387, 390 (2006), that a respondent parent who appeared at a termination hearing with counsel, participated in the hearing, and failed to object to the absence of proper notice waived the right to complain about the lack of proper notice on appeal (citing *In re B.M., M.M., An.M., & Al.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005)). Although Respondent-Mother did not appear at the hearing, her trial counsel did. Despite having ample opportunity to object to the fact that notice that the termination hearing would be held on 8 July 2009 was not sent to Respondent-Mother until 18 June 2009, he did not do so. As a result, in addition to finding that Respondent-Mother was not prejudiced by the fact that notice of the exact date of the termination hearing was not mailed to her until 18 June 2009, we further conclude that Respondent-Mother has waived the right to object to any deficiencies in the notice of the 8 July 2009 hearing that was provided to her by the failure of her trial counsel to lodge a notice-based objection during the course of that hearing.

Respondent-Mother also contends that the order terminating her parental rights in Thomas should be vacated because the time specified in the 18 June 2009 notice for the 8 July 2009 termination hearing was incorrect. As we understand Respondent-Mother's argument, she contends that the notice indicated that the hearing would begin at 9:00 a.m. on 8 July 2009, but it actually occurred at 12:17 p.m. However, Respondent-Mother does not cite any authority in support of her argument that the three hour and seventeen minute differential between the time specified in the notice sent to her pursuant to N.C. Gen. Stat. § 7B-1106.1(b)(5) and the time that the hearing actually began provides any basis for an award of appellate relief. Furthermore, an examination of the record strongly suggests that the hearing started at 12:17 p.m. rather than 9:00 a.m. because Respondent-Mother's trial counsel had scheduling conflicts which the trial court elected to accommodate,⁸ a factor about which Respondent-Mother

8. According to the transcript, Respondent-Mother's trial counsel indicated that he was not present promptly at 9:00 a.m. on 8 July 2009 because he had a hearing before the Clerk of Superior Court and that he was also involved in a workers' compensation mediation that was occurring in his office and in proceedings in a criminal session of the District Court that morning as well. However, Respondent-Mother's trial counsel indicated that he had reported to the juvenile court at 9:30 a.m. and that he was ready to proceed when the matter was called for hearing.

STATE v. WILSON

[203 N.C. App. 547 (2010)]

has very little grounds to complain. In addition, there is no indication that Respondent-Mother appeared at the time specified in the notice sent to her pursuant to N.C. Gen. Stat. § 7B-1106.1(b)(5) or at any other time. In fact, Respondent-Mother's trial counsel indicated that he had not heard from her for several months prior to the termination hearing and that "what I should have done is move to withdraw[,] but I hate to do that in case she does contact me again." Finally, Respondent-Mother has not established that she sustained any prejudice as a result of the fact that the termination hearing began at 12:17 p.m. rather than at 9:00 a.m. Thus, we conclude that this argument has no merit.

As a result, for the reasons set forth above, we conclude that Respondent-Mother has not demonstrated that any prejudicial error occurred in the proceedings leading up to the entry of the trial court's order terminating her parental rights in Thomas. Thus, the trial court's order terminating Respondent-Mother's parental rights in Thomas should be, and hereby is, affirmed.

Affirmed.

Judges McGEE and ROBERT C. HUNTER concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER RAESHAD WILSON

No. COA09-1162

(Filed 20 April 2010)

1. Evidence— codefendant's conviction—admission not plain error

There was no plain error where the mother of a codefendant was allowed to testify that her son was serving his time for this matter. The State concedes error, but there was other, substantial evidence of defendant's guilt. The same reasoning applies to testimony elicited by defendant on cross-examination of the same witness; even if it was not invited error, its exclusion would not have changed the result.

STATE v. WILSON

[203 N.C. App. 547 (2010)]

2. Possession of Stolen Property— property hidden—insufficient evidence

The trial court erred by denying defendant's motion to dismiss the charge of felony possession of stolen goods where a stolen shotgun used in the commission of a robbery was hidden by the codefendant in his mother's home. The evidence was not sufficient to establish that defendant knew or had reasonable grounds to believe that the gun was stolen.

Appeal by defendant from judgments entered 23 February 2009 by Judge Richard D. Boner in Superior Court, Gaston County. Heard in the Court of Appeals 8 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

WYNN, Judge.

Defendant Christopher Raeshad Wilson appeals from convictions on charges of two counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, possession of stolen goods, and two counts of assault by pointing a gun. Upon careful review, we uphold all of his convictions except that for possession of stolen goods because we conclude the evidence was insufficient to establish that Defendant knew or had reasonable grounds to believe the gun was stolen.

At trial, the State's evidence tended to show that on 16 December 2007 at about 8:00 p.m., Albert Cedeno worked at his small grocery store in Gaston County. Tracy Rico and her two daughters were in the store. While Albert Cedeno and Tracy Rico talked, two men entered the store. The men, dressed in black, wore handkerchiefs over their faces and one carried a shotgun. The men ordered everyone to get on the ground or they would kill them all. The man with the shotgun told Albert Cedeno and Tracy Rico to hand over their money. Afterwards, the man with the gun pointed it at Tracy Rico. Albert Cedeno got between the man and Tracy Rico, and the man shot him in the stomach. The masked men then left the store.

Thereafter, Officer Matt Willis arrived at the scene and Tracy Rico described the suspects to him as two light-skinned black males, about five-eight and 145 pounds, wearing black coats, blue jeans, and ban-

STATE v. WILSON

[203 N.C. App. 547 (2010)]

dannas. After hearing the descriptions, Officer Willis radioed other officers to check Defendant's residence which he knew to be a short distance from the store. Officer Nikki Armstrong responded by going to the nearby residence and speaking to Defendant's father who revealed that Defendant was at 1217 Mountain Avenue. At that address, Officer Armstrong spoke to Diane Dameron, later identified as the mother of Codefendant Billy Ray Dellinger. Diane Dameron consented to a search of her house which revealed a shotgun in her bedroom closet.

At trial, Diane Dameron testified that her son and Defendant came to her house around 8:00 p.m. on the date of the incident. She let them in and her son went directly to her bedroom while Defendant stayed in the living room. She did not see whether her son or Defendant had anything with them, but she heard Defendant say, "[t]he Mexican man grabbed me, and I shot him in the stomach." After her son returned to the living room, he said, "I thought we had one hundred dollars." She testified that after her son and Defendant left the house, the police arrived and found the shotgun; she did not put the shotgun in her closet; and she would not keep a shotgun in the house.

During direct examination, the prosecutor asked Diane Dameron where her son (Codefendant Dellinger) was. She responded that her son was in prison serving his time. When asked if that prison time was for this matter, she replied, "yes."

On cross-examination, Defendant's counsel asked Diane Dameron if she was covering for her son when she initially failed to tell the police everything she knew on the night of the robbery. She replied, her son was doing his time; "[t]hey both did it together;" and "[i]f they did the crime, they should do the time together."

Diane Dameron's six-year-old grandson, T.F., testified for the State that he was at his grandmother's house on the night of the robbery. He stated that Codefendant Dellinger and Defendant came to his grandmother's house and Defendant said he had shot a man in the stomach. T.F. testified that he saw money on the couch, the two men counted it, and thereafter took the money with them.¹

Later on the night of the incident, police officers arrested Defendant and Codefendant Dellinger. Defendant was charged with two counts of robbery with a dangerous weapon; one count of at-

1. When T.F. was first asked what the men did with the money, he replied "[m]y mama took it." He later testified, however, that after counting the money in the living room, the men took the money with them when they left.

STATE v. WILSON

[203 N.C. App. 547 (2010)]

tempted first-degree murder; one count of assault with a deadly weapon with intent to kill inflicting serious injury; one count of possession of stolen goods; and three counts of assault by pointing a gun. The shotgun retrieved from Diane Dameron's closet revealed no identifiable fingerprints.

Regarding the possession of stolen goods charge, the State presented testimony from Betty and Trent Ginn that the shotgun was stolen from their house in November 2007. Betty Ginn testified that she came home from work to find the back door broken open. She testified that money, jewelry, and her son's shotgun were stolen. Betty Ginn's son Trent identified the shotgun recovered from Mountain Avenue as his gun by reference to the serial number. He testified that he was not at his parents' home when the shotgun was stolen.

At the close of the State's evidence, the trial judge dismissed one count of assault by pointing a gun. Thereafter, Defendant moved to dismiss the charge of possession of stolen goods. The trial court denied the motion, finding that Defendant and Codefendant Dellinger brought the gun to Diane Dameron's home "for the purpose of hiding it, which in and of itself would raise an inference that they knew the weapon was hot and didn't want to be seen with it out in public."

The jury found Defendant not guilty of attempted first-degree murder but guilty of two counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, possession of stolen goods, and two counts of assault by pointing a gun. On appeal from those convictions, Defendant argues the trial court (I) committed plain error by admitting testimony from Diane Dameron that Codefendant Dellinger was in prison for this matter and that Defendant and Codefendant Dellinger committed these crimes together; and (II) erred by denying Defendant's motion to dismiss the charge of felony possession of stolen goods.

I

[1] Defendant first argues that the trial court committed plain error by allowing testimony of Diane Dameron on direct examination that her son, Codefendant Dellinger, was serving his time for this matter. Defendant also argues that the trial court committed plain error in allowing the following testimony during his attorney's cross-examination of Diane Dameron:

Q: And the police showed up; and when you first start talking to them you don't let them in on any of this right?

STATE v. WILSON

[203 N.C. App. 547 (2010)]

A: I did not want to get involved. I was so shook up and nervous, I just didn't really want to get involved. I don't like to get nobody in trouble like this. I don't like reports. I'm too nervous.

Q: But you testified earlier that you were not going to cover for your son.

A: No, I'm not going to cover for him.

Q: That's what you did, wasn't it?

A: He was in with it, and he's doing his time. They both did it together, then they both should do the time together. If they did the crime, they should do the time together. I'm not picking up for my kids.

"Where, as here, a criminal defendant fails to object to the admission of certain evidence, the plain error analysis . . . is the applicable standard of review." *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (2000). "Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.'" *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)), *cert. denied*, *Jones v. North Carolina*, 543 U.S. 1023, 160 L. Ed. 2d 500 (2004).

The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citations omitted).

Our Supreme Court articulated the rule regarding the introduction of a codefendant's conviction thusly:

STATE v. WILSON

[203 N.C. App. 547 (2010)]

[T]he plea of guilty of a codefendant is not competent evidence against the defendant on trial, and . . . where one defendant had been separately tried and convicted, or had pleaded guilty prior to the defendant then on trial, the record of the codefendant's prior conviction or plea is not admissible, and the fact that the codefendant had been convicted or had pleaded guilty to the same charge is not competent. Where two persons are indicted jointly, the crime is several in nature. The guilt of one is not dependent upon the guilt of the other. If one is convicted or pleads guilty, this is not evidence of the guilt of the other.

State v. Jackson, 270 N.C. 773, 775, 155 S.E.2d 236, 237 (1967). Later, in *State v. Brown*, 319 N.C. 361, 354 S.E.2d 225 (1987), our Supreme Court applied this rule stating,

the jury was exposed to strong and virtually irrebuttable evidence that the alleged principals were convicted of the same crimes charged against this defendant. Such evidence must have strongly influenced the jury to believe that the alleged principals actually had committed the crimes charged here, a critical element in the charges against this defendant Brown upon the State's theory that he participated in the crimes as an aider and abettor.

Id. at 365-66, 354 S.E.2d at 227. The Court in *Brown* went on to hold that the error was not harmless beyond a reasonable doubt. *Id.* at 366, 354 S.E.2d at 228.

In this case, the State concedes that the cases cited by Defendant support the position that evidence of convictions against a codefendant is not competent evidence for the purpose of establishing that the current defendant also committed the crimes charged. The State argues, however, that the error does not rise to the level of plain error because there was substantial evidence of Defendant's guilt and it cannot be concluded that the jury would have reached a different verdict had the trial court excluded the testimony.

The evidence at trial tended to show that two men entered Albert Cedeno's store demanding money; one of the men pointed a shotgun at Albert Cedeno, Tracy Rico, and her children; Albert Cedeno was shot; Defendant and Codefendant Dellinger went to Diane Dameron's house that same evening; Defendant stated that he had shot a Mexican man; the two men left a shotgun in Diane Dameron's closet; they had cash with them; and the shotgun found in Diane Dameron's closet had been recently stolen.

STATE v. WILSON

[203 N.C. App. 547 (2010)]

In light of the substantial evidence presented by the State in this case, we hold that this is not a case like *Brown* where the evidence of Billy Ray Dellinger's conviction was "a critical element in the charges against this defendant . . . upon the State's theory that he participated in the crimes as an aider and abettor." *Id.* at 366, 354 S.E.2d at 227. Thus, after careful review, we cannot conclude that the erroneous introduction of Codefendant Dellinger's conviction on the State's direct examination of Diane Dameron "tilted the scales" and caused the jury to reach its verdict convicting Defendant.

Regarding Defendant's cross-examination, our Supreme Court addressed a similar issue in a recent case by holding that "[the witness] was answering a line of questioning propounded by defendant, and therefore any error as to her testimony was invited." *State v. Raines*, 362 N.C. 1, 11-12, 653 S.E.2d 126, 133 (2007), *cert. denied*, *Raines v. North Carolina*, 129 S. Ct. 2857, 174 L. Ed. 2d 601 (2009); *see also* N.C. Gen. Stat. § 15A-1443(c) (2009) ("A defendant is not prejudiced . . . by error resulting from his own conduct."). In this case, we likewise hold that even had this not been invited error, its exclusion would not have changed the result of the trial.

II

[2] Defendant further argues that the trial court committed reversible error by denying his motion to dismiss the charge of felony possession of stolen goods because the evidence was insufficient to establish that Defendant knew or had reasonable grounds to believe that the gun was stolen. We agree.

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). "In conducting our analysis, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

STATE v. WILSON

[203 N.C. App. 547 (2010)]

For a defendant to be found guilty of possession of a stolen firearm, the State must present substantial evidence that (1) the defendant was in possession of a firearm; (2) which had been stolen; (3) the defendant knew or had reasonable grounds to believe the property was stolen; and (4) the defendant possessed the [firearm] with a dishonest purpose.

State v. Brown, 182 N.C. App. 277, 281, 641 S.E.2d 850, 853 (2007) (citing N.C. Gen. Stat. § 14-71.1 (2003)). “Other cases upholding convictions when knowledge was at issue have contained some evidence of incriminating behavior on the part of the accused.” *State v. Allen*, 79 N.C. App. 280, 285, 339 S.E.2d 76, 79, *aff’d per curiam*, 317 N.C. 329, 344 S.E.2d 789 (1986).

In this case, Defendant asserts that there was no evidence of any such incriminating behavior. Regarding the trial court’s finding that Defendant and Codefendant Dellinger brought the gun to Diane Dameron’s home with the purpose of hiding it, Defendant replies that “it is equally, if not more, logical to infer that [Defendant] and Billy Ray Dellinger left the gun in Diane Dameron’s home because it had just been used during the perpetration of a robbery and assault.”

This Court addressed the issue of knowledge to support a stolen handgun charge in *State v. Wilson*, 106 N.C. App. 342, 416 S.E.2d 603 (1992). In that case, this Court held that there was sufficient evidence of guilty knowledge where a stolen handgun, one that had been used in the perpetration of several robberies, was thrown from a car while the suspects were fleeing the police. *Id.* at 347-48, 416 S.E.2d at 606. We reiterated that “[d]efendant’s guilty knowledge can be implied from the circumstances.” *Id.* at 347, 416 S.E.2d at 606 (citing *State v. Parker*, 316 N.C. 295, 303, 341 S.E.2d 555, 560 (1986)). This was because an accused’s flight is evidence of consciousness of guilt and therefore of guilt itself. *Id.* at 348, 416 S.E.2d at 606.

In *State v. Taylor*, 64 N.C. App. 165, 307 S.E.2d 173 (1983), *modified*, 311 N.C. 380, 317 S.E.2d 369 (1984), we held that evidence that defendant removed a firearm from his coat and threw it into bushes was sufficiently incriminating to permit a reasonable inference that defendant knew the firearm was stolen, and therefore sufficient to go to the jury on that issue.

Id. These cases establish the rule that guilty knowledge can be inferred from defendant’s throwing away the stolen weapon, despite an intervening crime committed by defendant with the weapon.

STATE v. WILSON

[203 N.C. App. 547 (2010)]

In the present case, the evidence showed that shortly after the robbery, Defendant and Codefendant Dellinger appeared at Diane Dameron's home. They beat on the door with some urgency, and when they were admitted Codefendant Dellinger went directly to Diane Dameron's bedroom. The two men didn't stay for very long, but left the house shortly after disposing of the shotgun in the bedroom closet. The evidence showed that the shotgun recovered from Diane Dameron's house on 16 December 2007 was the same shotgun that was stolen from the Ginn residence in November 2007. The State presented no evidence that Defendant actually knew the shotgun was stolen. The issue is thus whether Defendant's guilty knowledge can be inferred from his placement of the stolen property.

While it is certainly possible to hide stolen property in one's residence, *see State v. Wilson*, 176 N.C. 751, 755, 97 S.E. 496, 497 (1918), the mere fact of depositing it there does not by itself constitute incriminating behavior. Codefendant Dellinger's leaving the gun in his mother's home is not analogous to throwing it from a car, as in *Wilson*, 106 N.C. App. at 348, 416 S.E.2d 603 at 606, or tossing it into the bushes, as in *Taylor*. Viewing this evidence in the light most favorable to the State, we conclude that the evidence was insufficient to establish that Defendant knew or had reasonable grounds to believe the gun was stolen. The trial court therefore erred in denying Defendant's motion to dismiss the charge of felony possession of stolen goods.

No prejudicial error in part; reversed in part.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE EX REL. COMM’R OF INS. v. DARE CNTY.

[203 N.C. App. 556 (2010)]

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE AND NORTH CAROLINA RATE BUREAU, APPELLEES v. DARE COUNTY, TOWN OF NAGS HEAD, TOWN OF SOUTHERN SHORES, STARCO REALTY & CONSTRUCTION, INC., JOSEPH M. GERAGHTY, WASHINGTON COUNTY, CURRITUCK COUNTY, HYDE COUNTY, THE TOWN OF DUCK, THE TOWN OF SOUTHERN SHORES, AND THE TOWN OF INDIAN BEACH, APPELLANTS

No. COA09-701

(Filed 20 April 2010)

Insurance— homeowners—rate increase—failure to include requisite findings

Appellants’ appeal from an order of the North Carolina Commissioner of Insurance approving a statewide overall increase in homeowners’ insurance rates, with changes varying by form and territory, was dismissed. Under the statutory ratemaking procedure of N.C.G.S. § 58-2-80, the Court of Appeals cannot assume jurisdiction over any order of the Commissioner that does not include the requisite findings in a contested hearing.

Appeal by appellants from order entered 18 December 2008 by the North Carolina Commissioner of Insurance. Heard in the Court of Appeals 14 January 2010.

Williams Mullin, by M. Keith Kapp, Kevin Benedict, and Jennifer A. Morgan, for appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Johnson and Assistant Attorney General David W. Boone, for appellees North Carolina Department of Insurance and Commissioner of Insurance.

Young Moore and Henderson, P.A., by R. Michael Strickland, William M. Trott, Marvin M. Spivey, Jr. and Glenn C. Raynor, for appellee North Carolina Rate Bureau.

CALABRIA, Judge.

Dare County, the Town of Nags Head, the Town of Southern Shores, Starco Realty & Construction, Inc., Joseph M. Geraghty, Washington County, Currituck County, Hyde County, the Town of Duck, and the Town of Indian Beach (collectively “appellants”) appeal from the 18 December 2008 order of the North Carolina Commissioner of Insurance (“the Commissioner”) approving, *inter*

STATE EX REL. COMM’R OF INS. v. DARE CNTY.

[203 N.C. App. 556 (2010)]

alia, a statewide overall increase in homeowners’ insurance rates (with changes varying by form and territory). For the reasons stated below, we dismiss the appeal.

I. Background

The North Carolina Rate Bureau (“the Bureau”) is a statutorily created entity that consists of member insurance companies who offer, *inter alia*, homeowners’ insurance in North Carolina. *See* N.C. Gen. Stat. § 58-36-1 *et seq.* All insurers issuing homeowners’ insurance policies in North Carolina are required by statute to become members of the Bureau. N.C. Gen. Stat. § 58-36-5(a) (2007). The statutory duties of the Bureau include filing proposed insurance rates, rating plans, and insurance territory classification plans utilized by its member companies for approval by the Commissioner. *See* N.C. Gen. Stat. §§ 58-36-1(3) and 58-36-15.

On 8 December 2008, the Bureau submitted a filing to the North Carolina Department of Insurance (“the Department”) and the Commissioner proposing revisions in homeowners’ insurance rates throughout North Carolina (“the initial rate filing”). On 10 December 2008, the Department issued a press release regarding the initial rate filing. The press release included the proposed rate changes for the various insurance territories. In addition, the press release stated that the Department would “review the data to determine if the requests are justified” and that the Commissioner would “make a decision fairly quickly.” None of the appellants filed motions to intervene regarding the initial rate filing.

After conducting negotiations regarding the initial rate filing, the Department and the Bureau entered into a “Consolidated Settlement Agreement and Consent Order” (“the Consent Order”).¹ The Commissioner approved the Consent Order on 18 December 2008. According to the Consent Order, the overall homeowners’ insurance rate, statewide, would increase by 3.9%. Rate revisions varied by territory throughout the State and included both decreases and increases, with the largest increase being 29.8% for homeowners in Territory 42 (located on the east coast of North Carolina). The rate revisions were applicable to all policies that became effective on or after 1 May 2009. Appellants are located in insurance territories that received some of the largest rate increases.

1. The Bureau also submitted a filing on 11 December 2008, proposing revisions to the definitions of certain insurance territories. This filing was also resolved by the Consent Order.

STATE EX REL. COMM'R OF INS. v. DARE CNTY.

[203 N.C. App. 556 (2010)]

On 20 January 2009, appellants filed with the Department a "Notice of Appeal and Exceptions" to this Court, challenging the Consent Order.

II. Ratemaking Procedure

The General Assembly has established the statutory procedure the Bureau must utilize in order to request a change in homeowners' insurance rates. The Bureau must submit proposed rate changes, which must include all of the items listed in N.C. Gen. Stat. § 58-36-15(h) (2007), to the Commissioner. N.C. Gen. Stat. § 58-36-15(a) (2007). Additionally, the Department has promulgated regulations that further detail and specify the contents of a rate filing, as authorized by N.C. Gen. Stat. § 58-36-15(h)(14). *See* 11 N.C. Admin. Code 10.1105 (2008).

Once the Bureau has completed a rate filing with the required information, it is submitted to the Commissioner for consideration. The rate filing may be approved in one of two ways: (1) the Commissioner may formally approve the filing; or (2) if the Commissioner does not issue a notice of hearing within 50 days of the rate filing, the rate filing is deemed approved by operation of law. N.C. Gen. Stat. §§ 58-36-15 and 58-36-20 (2007). A rate filing "shall become effective on the date specified in the filing, but not earlier than 210 days from the date the filing is received by the Commissioner[.]" N.C. Gen. Stat. § 58-36-15(a) (2007). However, "any filing may become effective on a date earlier than that specified in this subsection upon agreement between the Commissioner and the Bureau." *Id.*

If, after reviewing the rate filing, the Commissioner determines that the rates requested are "excessive, inadequate or unfairly discriminatory," the Commissioner must send written notice to the Bureau fixing a date for hearing not less than 30 days from the date of the mailing of such notice. N.C. Gen. Stat. §§ 58-36-10 and 58-36-20 (2007). If a hearing is ordered, the Bureau and the Department both participate in the hearing as opposing parties, with the Commissioner serving as the hearing officer to adjudicate the dispute. *See* N.C. Gen. Stat. § 58-36-15 (2007).

At the hearing the factors specified in G.S. 58-36-10 shall be considered. If the Commissioner after hearing finds that the filing does not comply with the provisions of this Article, he may issue his order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a rea-

STATE EX REL. COMM'R OF INS. v. DARE CNTY.

[203 N.C. App. 556 (2010)]

sonable time, after which the filing shall no longer be effective. Any order of disapproval under this section must be entered within 210 days after the date the filing is received by the Commissioner.

N.C. Gen. Stat. § 58-36-20 (2007).² Pursuant to the North Carolina Administrative Code, “[i]nformal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement, or consent order at any time during the proceedings. Parties may enter into such agreements on their own or may ask for a settlement conference with the hearing officer to promote consensual disposition of the case.” 11 N.C. Admin. Code 1.0417 (2008).

The North Carolina Administrative Code also permits (but does not require) the hearing officer to allow, upon a proper showing by an interested party, intervention in a contested case. *See* 11 N.C. Admin. Code 1.0425 (2008).

Whenever any provision of this Chapter requires a person to file rates . . . with the Commissioner or Department for approval, the approval or disapproval of the filing is an agency decision under Chapter 150B of the General Statutes only with respect to the person making the filing or any person that intervenes in the filing.

N.C. Gen. Stat. § 58-2-53 (2007).

II. Jurisdiction

The parties agree that a direct appeal of any order or decision of the Commissioner to this Court must be made pursuant to N.C. Gen. Stat. § 58-2-80 (2007). Appellants, the Department, and the Commissioner all argue that, in the instant case, appeal pursuant to § 58-2-80 is inappropriate, and therefore, this Court lacks subject matter jurisdiction to hear this appeal. We agree.

“Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy.” *Hardy v. Beaufort Cty. Bd. of Educ.*, — N.C. App. —, —, 683 S.E.2d 774, 778 (2009) (citation omitted). “[T]he issue of subject matter jurisdiction may be raised at any time, even on appeal.” *Huntley v. Howard Lisk Co.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002).

N.C. Gen. Stat. § 58-2-80 states, in relevant part:

2. This statutory procedure was modified in 2009. *See* 2009 N.C. Sess. Laws 472, § 4.

STATE EX REL. COMM'R OF INS. v. DARE CNTY.

[203 N.C. App. 556 (2010)]

Any order or decision of the Commissioner *that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest* or that a classification or classification assignment is unwarranted, unreasonable, improper, unfairly discriminatory or not in the public interest may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby.

N.C. Gen. Stat. § 58-2-80 (2007) (emphasis added).

In order to determine if this Court has the authority to hear the instant appeal, we must determine whether the language of the Consent Order places it within the above italicized statutory language. Initially, we note that the Bureau argues that the General Assembly intended that ALL appeals from any rate changes approved by the Commissioner may only be appealed pursuant to N.C. Gen. Stat. § 58-2-80. We disagree.

The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. The legislative purpose of a statute is first ascertained by examining the statute's plain language. Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 574-75, 573 S.E.2d 118, 121 (2002) (internal quotations and citations omitted). The plain language of N.C. Gen. Stat. § 58-2-80 limits direct appeals of rate changes to this Court to "[a]ny order or decision of the Commissioner that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest[.]" Under the statutory ratemaking procedure, the Commissioner would only issue an order with the requisite findings after presiding over a contested hearing on a rate filing. This Court cannot assume jurisdiction over any order of the Commissioner that does not include those requisite findings without acting contrary to the plain language of N.C. Gen. Stat. § 58-2-80.

The Consent Order negotiated by the Bureau and the Department stated that although the parties agreed to accept the negotiated rates, neither party was "condoning, validating, accepting, or agreeing to the other's theories, methodologies, or calculations[.]" The Consent

STATE v. HAGIN

[203 N.C. App. 561 (2010)]

Order also stated that it appeared to the Commissioner “that settlement under the circumstances set forth above is fair and reasonable and should be approved[.]” All outstanding issues in the rate filing were settled without any formal determination by the Commissioner that the initial rate filing did not comply with statutory requirements. As a result, the Commissioner never held a contested hearing regarding the initial rate filing. Without a contested hearing, there necessarily could not be an order of the Commissioner finding the rates proposed in the initial rate filing to be excessive, inadequate, unreasonable, unfairly discriminatory or otherwise not in the public interest. Instead, the rates agreed to by the parties in the Consent Order, while different from the rates proposed by the Bureau in the initial rate filing, were specifically found to be fair and reasonable by the Commissioner.

III. Conclusion

By its plain language, N.C. Gen. Stat. § 58-2-80 does not apply to the Consent Order. Since a direct appeal of the Consent Order to this Court is not authorized by statute, this Court lacks subject matter jurisdiction to hear this appeal. The instant case must be dismissed.

Dismissed.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. TIMOTHY BRIAN HAGIN

No. COA09-1092

(Filed 20 April 2010)

1. Appeal and Error— preservation of issues—failure to argue

Although defendant assigned error to certain findings of fact made by the trial court, these assignments of error were deemed abandoned under N.C. R. App. P. 28(b)(6) based on his failure to argue them in his brief.

STATE v. HAGIN

[203 N.C. App. 561 (2010)]

2. Search and Seizure— outbuilding within curtilage—motion to suppress—consent

The trial court did not err in a manufacturing methamphetamine case by denying defendant's motion to suppress evidence from the search of an outbuilding within the curtilage of the residence after he consented to a search of his property. The search was within the scope of defendant's consent.

Appeal by defendant from judgment entered 24 March 2009 by Judge Joseph Crosswhite in Anson County Superior Court. Heard in the Court of Appeals 24 February 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Kevin P. Bradley for the defendant-appellant.

STEELMAN, Judge.

The trial court did not err in denying defendant's motion to suppress evidence from the search of an outbuilding within the curtilage of the residence after he consented to a search of his property.

I. Factual and Procedural Background

Materials were found discarded on the side of Doc Wyatt Road that were consistent with the manufacture of methamphetamine. These materials included mail addressed to defendant's wife at 19 Doc Wyatt Road. On 26 November 2007, Detectives Randy Henry (Detective Henry) and Brian Tice (Detective Tice), as well as Lieutenant Detective Tim Watkins, went to defendant's residence at 19 Doc Wyatt Road to conduct a "knock and talk" to discuss suspected production of methamphetamine.

Defendant and his wife executed a written consent to search. The form permitted a search of "the PERSONAL or REAL PROPERTY located at 19 Doc Wyatt Road, Wadesboro, NC, 28170," described as a "Single wide mobile home, brown in color with a covered wooden porch." Detective Tice informed the Hagins that they could withdraw their consent at any time and began to search the mobile home.

Defendant accompanied the officers as they searched the mobile home. Detectives Tice and Watkins, and defendant, then went outside to the rear of the mobile home. Tice observed a small outbuilding located approximately 15-20 feet from the back porch of the mobile

STATE v. HAGIN

[203 N.C. App. 561 (2010)]

home. He saw a small exhaust fan in the outbuilding that was positioned to vent the outbuilding. Tice asked defendant about the fan and received no response.

Accompanied by defendant, Detective Tice approached the outbuilding, looked inside, and saw a cardboard box, which contained materials that strongly suggested methamphetamine manufacture. Detective Tice removed the box and questioned defendant about its contents. Defendant became emotional and confessed to operating a methamphetamine lab. At no time did defendant or his wife withdraw their consent to search their real and personal property.

Defendant was indicted and charged with manufacturing methamphetamine. On 18 March 2009, defendant filed a motion to suppress the materials found in the outbuilding. This motion was denied on 23 March 2009. That same date, defendant pled guilty to manufacture of methamphetamine, preserving his right to appeal the denial of his suppression motion. Defendant was sentenced to an active term of imprisonment of 58-79 months.

Defendant appeals.

II. Denial of Defendant's motion to suppress

In his only argument, defendant contends that the trial court erred in denying his motion to suppress evidence found in the outbuilding. We disagree.

A. Standard of Review

The standard of review of a trial court's suppression order is limited to "determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Great deference is accorded the trial judge because the trial court is "entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision." *Id.* at 134, 291 S.E.2d 620. The trial court's findings are conclusive "if supported by any competent evidence even if there is evidence to the contrary that would support different findings." *State v. Hawley*, 54 N.C. App. 293, 297, 283 S.E.2d 387, 390 (1981) (citation omitted), *disc. review denied*, 305 N.C. 305, 291 S.E.2d 152 (1982). If the trial court's findings of fact are supported by competent evidence, this Court then determines whether those factual findings support the trial court's ultimate conclusions of law. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

STATE v. HAGIN

[203 N.C. App. 561 (2010)]

B. Findings of Fact

[1] While defendant has assigned as error certain of the findings of fact made by the trial court, he does not argue in his brief that any of these findings are unsupported by competent evidence in the record. Rather, he argues that the trial court should have adopted defendant's interpretation of the scope of the consent to search. In the absence of an argument that the trial court's findings are not supported by competent evidence, these assignments of error are deemed abandoned. *Eakes v. Eakes*, — N.C. App. —, —, 669 S.E.2d 891 (2008); N.C. R. App. P. 28(b)(6). Our review is thus limited to whether the trial court's findings of fact support its conclusions of law. *Cooke*, 306 N.C. at 134, S.E.2d at 619.

C. Conclusions of Law

[2] Defendant asserts the trial court erred in concluding that defendant's consent to search encompassed the outbuilding. Defendant contends the search of the outbuilding exceeded the scope of consent, and that search warrant cases construing the scope of a permissible search are not applicable to consent to search cases.

The Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution require the issuance of a warrant supported by probable cause to conduct a search. U.S. Const. amend. IV; N.C. Const. art. I, § 20. North Carolina recognizes consent searches as an exception to the general warrant requirement. *State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973)), *appeal dismissed and disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990). "The scope of the search can be no broader than the scope of the consent." *State v. Johnson*, 177 N.C. App. 122, 124, 627 S.E.2d 488, 490 (quotations and citations omitted), *vacated in part on other grounds*, 360 N.C. 541, 634 S.E.2d 889 (2006).

The scope of a valid consent search is measured against a standard of objective reasonableness where the court asks "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991). "The scope of a search is generally defined by its expressed object." *Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 303.

When a search is conducted pursuant to a valid search warrant, "[t]he premises of a dwelling house include, for search and seizure

STATE v. HAGIN

[203 N.C. App. 561 (2010)]

purposes, the area within the curtilage.” *State v. Courtright*, 60 N.C. App. 247, 249, 298 S.E.2d 740, 742, *appeal dismissed and disc. review denied*, 308 N.C. 192, 302 S.E.2d 245 (1983). The search of an outbuilding within the curtilage of the home does not exceed the scope of a warrant permitting the search of a suspect’s property. *See State v. Travatello*, 24 N.C. App. 511, 513, 211 S.E.2d 467, 469 (1975) (holding that “[t]he search of the defendant’s premises did not exceed the scope of the warrant by including a tool shed as well as the house itself.”); *see also State v. Trapper*, 48 N.C. App. 481, 269 S.E.2d 680, *appeal dismissed*, 301 N.C. 405, 273 S.E.2d 450 (1980), *cert. denied*, 451 U.S. 997, 68 L. Ed. 2d 856 (1981). Searches within proscribed limits, but conducted in areas different than those described in a warrant, do not exceed the scope of a search. *Trapper*, 48 N.C. App. at 487, 269 S.E.2d at 684 (holding the scope of a search warrant was not exceeded when the place searched varied from a description given on the form).

We hold that these principles used to define the scope of a search warrant are equally applicable to our analysis of the scope of a search conducted pursuant to consent. Defendant expressly consented to a search of all of the personal or real property at 19 Doc Wyatt Road. He does not contest that the outbuilding was located within the curtilage of his residence. The search of the outbuilding was within the scope of consent given in this case.

This Court has previously addressed the issue of the scope of consent permitted by a consent to search form. In *State v. Williams*, a consent to search form was signed by defendant allowing the search of vehicles located at the Mecklenburg County Police Department. 67 N.C. App. 519, 522, 313 S.E.2d 237, 238, *cert. denied*, 311 N.C. 308, 317 S.E.2d 909 (1984). The actual search took place after defendant’s vehicle was moved to the police department’s impound yard. *Id.* This Court determined that “[t]he statement in the consent form regarding the vehicle’s location was descriptive of the subject of search rather than proscriptive as to place,” and held that the search did not exceed the scope of the consent to search. *Id.*

The consent to search form proscribed the area of the search as the personal or real property at 19 Doc Wyatt Road. Detective Tice explained to defendant that they were there to search the property for evidence of methamphetamine production. Detective Tice did not state that the search would be confined to only the mobile home. A reasonable person under these circumstances would have under-

NORRIS v. NORRIS

[203 N.C. App. 566 (2010)]

stood that the officers were there to conduct a search of their property for methamphetamine production materials.

The property included not only the interior of the mobile home, but also outbuildings located within the curtilage of the residence. We note that when the actual search took place, defendant made no objection to the search of the outbuilding. A reasonable person, who believed that his consent did not include the outbuilding, would have objected to the search of the outbuilding. Defendant's silence is some evidence that at the time of the search he believed the outbuilding to be within the scope of his consent. The trial court correctly saw that defendant's contentions concerning an alleged violation of the scope of his consent arose only following his arrest.

The trial court correctly concluded that the search of the outbuilding by the Anson County Sheriff's Department was within the scope of defendant's consent. The denial of defendant's motion to suppress is affirmed.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

RICKY C. NORRIS AND TERESEA L. NORRIS, PLAINTIFFS v.
JASON CAMERON NORRIS, DEFENDANT v. ELIZABETH MIDKIFF, INTERVENOR

IN THE MATTER OF THE ADOPTION OF: J.N., A MINOR

No. COA09-1329

(Filed 20 April 2010)

Adoption— subject matter jurisdiction—district court and clerk of superior court

The district court lacked subject matter jurisdiction to review and declare void orders from the superior court clerk setting aside adoption decrees where the clerk's orders were both interlocutory and not appealed by plaintiffs. At that point, the adoptions were pending and contested by the maternal grandmother, and should have been transferred to district court. The matter was remanded for the clerk of superior court to determine whether the adoptions are still contested and, if so, to transfer the proceedings to district court.

NORRIS v. NORRIS

[203 N.C. App. 566 (2010)]

Appeal by intervenor from orders entered 1 June 2009 by Judge Lee W. Gavin in Randolph County District Court. Heard in the Court of Appeals 22 March 2010.

Joyce L. Terres for plaintiffs-appellees.

Jason Cameron Norris, pro se, defendant-appellee.

Kilpatrick Stockton LLP, by Adam H. Charnes and Richard D. Dietz; Legal Aid of North Carolina, Inc., by Brenda Bergeron, Janet McAuley Blue, and Suzanne Chester, for intervenor-appellant.

HUNTER, Robert C., Judge.

Intervenor Elizabeth Midkiff appeals from orders entered by the district court (1) declaring void prior orders by the clerk of superior court that set aside the adoption decrees involving the minor children in this case and (2) dismissing all claims and declaring void all prior custody orders regarding the children. We agree with Ms. Midkiff's principal argument that the district court lacked subject-matter jurisdiction to review the superior court clerk's orders setting aside the adoption decrees. Consequently, we vacate the district court's orders and remand the case to the superior court clerk.

Facts

Defendant Jason Cameron Norris and his wife Jennifer Leann Norris are the biological parents of C.N. (born September 2003) and J.N. (born December 2006). Jennifer Norris died on 24 March 2008 and Jason Norris was subsequently charged with first degree murder in connection with her death. On 31 March 2008, while Jason Norris was incarcerated awaiting trial, his parents, plaintiffs Ricky C. Norris and Teresea L. Norris, filed a complaint seeking custody of the minor child. In an order entered 9 April 2008, the district court granted custody of the children to the Norrises.

On 27 June 2008, the Norrises filed petitions with the clerk of superior court to adopt both C.N. and J.N. The Norrises did not provide notice to Ms. Midkiff, the children's maternal grandmother, of their petitions for adoption. On 4 August 2008 Ms. Midkiff filed a motion to intervene in the custody action and a motion in the cause for visitation. On 9 September 2008, the Norrises filed a motion to waive the 90-day time limit for disposition of adoption petitions. On 11 September 2008, the clerk entered an order waiving the 90-day

NORRIS v. NORRIS

[203 N.C. App. 566 (2010)]

time limit and entered decrees of adoption allowing the Norrises to legally adopt C.N. and J.N. The Norrises also filed on 11 September 2008 a motion to dismiss Ms. Midkiff's motion to intervene and motion for visitation.

On 17 November 2008, the clerk of superior court entered orders setting aside the adoption decrees, stating:

It has come to the attention of the undersigned that there is a visitation hearing pending in the Civil Division filed by the maternal grandparent and Notice was not given of th[ese] adoption proceeding[s] to the maternal grandparent. Therefore th[ese] Adoption[s] should be set aside.

IT IS THEREFORE ORDERED that the Decree[s] of Adoption [are] hereby set aside and Notice shall be given to the maternal grandparent before the Decree[s] can be entered.

After entry of the clerk's orders setting aside its adoption decrees, the Norrises served Ms. Midkiff with notice of their petitions for adoption. Ms. Midkiff subsequently filed a second motion to intervene and a second motion for visitation. On 27 February 2009, the district court entered an order allowing Ms. Midkiff's motion to intervene in the custody action and appointing a guardian *ad litem* for the children. That same day, the district court also entered an order consolidating the custody and adoption actions.

On 20 April 2009, Ms. Midkiff filed an amended motion for visitation and a motion for custody. The Norrises filed a motion on 4 May 2009 seeking reinstatement of the adoption decrees. Also on 4 May 2009, Ms. Midkiff filed a motion pursuant to Rule 60(b) of the Rules of Civil Procedure seeking to set aside the 9 April 2008 custody order.

After conducting a hearing on the Norrises' motion to reinstate the adoption decrees, the district court entered an order on 1 June 2009, in which the court concluded that the clerk of superior court lacked authority to enter the orders setting aside its own adoption decrees. Consequently, the district court declared that the clerk's 17 November 2008 orders were void and that the 11 September 2008 adoption decrees remained valid. The district court entered another order on 1 June 2009 concluding that since "the minor children who are the subject of this [custody] action have been legally adopted by the [Norrises], this court has no jurisdiction regarding any

NORRIS v. NORRIS

[203 N.C. App. 566 (2010)]

issue in this case.” The district court, therefore, dismissed the custody action and declared void all previous custody orders. Ms. Midkiff timely appeals to this Court from both of the district court’s 1 June 2009 orders.

Discussion

Ms. Midkiff argues on appeal that the district court lacked subject-matter jurisdiction to review the superior court clerk’s orders setting aside the adoption decrees. Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003). Subject-matter jurisdiction “involves the authority of a court to adjudicate the type of controversy presented by the action before it.” *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978), *cert. denied sub nom. Peoples v. Judicial Standards Comm’n of N.C.*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). “When a court decides a matter without the court’s having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened.” *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970).

Ms. Midkiff contends that the district court lacked the authority to declare the clerk’s 17 November 2008 orders void since no appeal was taken from those orders. N.C. Gen. Stat. § 48-2-607(b) (2009) provides in pertinent part that “[a] party to an adoption proceeding may appeal a final decree of adoption entered by a clerk of superior court to district court by giving notice of appeal as provided in G.S. 1-301.2.” N.C. Gen. Stat. § 1-301.2 (2009), in turn, provides in part that “a party aggrieved by an order or judgment of a clerk that *finally disposed* of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing de novo.” N.C. Gen. Stat. § 1-301.2(e) (emphasis added).

Here, the Norrises did not appeal the clerk’s 17 November 2008 orders setting aside the adoption decrees. Indeed, after the clerk entered the orders, the Norrises provided notice of the adoption proceedings to Ms. Midkiff as directed by the clerk’s orders. Thus, the district court did not obtain jurisdiction to review the clerk’s orders pursuant to an appeal under N.C. Gen. Stat. § 48-2-607(b). Because

NORRIS v. NORRIS

[203 N.C. App. 566 (2010)]

the Norrises did not appeal the clerk's 17 November 2008 orders, they remained in effect. *See* N.C. Gen. Stat. § 1-301.2(e) ("The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge.").

More importantly, however, the clerk's orders setting aside the adoption decrees did not "finally dispose[]" of the adoption proceedings for purposes of N.C. Gen. Stat. § 1-301.2(e), but rather continued the matter until Ms. Midkiff received notice. The clerk's orders setting aside the adoption decrees were interlocutory, and, therefore, not appealable pursuant to N.C. Gen. Stat. § 1-301.2(e). *See, e.g., Sanders v. May*, 173 N.C. 47, 49, 91 S.E. 526, 527 (1917) ("A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court." (citation and internal quotation marks omitted)). As the district court did not have jurisdiction to review the clerk's orders pursuant to an appeal, the district court's order is void. Accordingly, we vacate the district court's 1 June 2009 orders invalidating the clerk's 17 November 2008 orders, reinstating the adoption decrees, and dismissing the custody action.

After the clerk set aside the adoption decrees, the Norrises provided notice to Ms. Midkiff of the adoption proceedings and the district court granted her motion to intervene in the custody action. Ms. Midkiff then filed a motion to consolidate the adoption proceedings with the custody action. At that point, because the adoption action was still pending with the clerk and Ms. Midkiff contested the adoptions, the clerk was required to transfer the adoption proceedings to district court for adjudication. *See* N.C. Gen. Stat. § 48-2-601(a1) (2009) ("If an issue of fact, an equitable defense, or a request for equitable relief is raised before the clerk, the clerk shall transfer the proceeding to the district court under G.S. 1-301.2."); N.C. Gen. Stat. § 1-301.2(b) ("[W]hen an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk shall transfer the proceeding to the appropriate court.").

Here, in this case, the clerk did not enter an order pursuant to N.C. Gen. Stat. § 48-2-601(a1) transferring the adoption action to the district court. We, therefore, remand this case to the clerk of superior court to determine whether the adoption action is still contested, and, if so, to transfer the adoption proceedings to district court for a

NORRIS v. NORRIS

[203 N.C. App. 566 (2010)]

hearing under N.C. Gen. Stat. § 48-2-603 (2009) to determine whether adoption by the Norrises is in the best interests of the children.

Vacated and remanded.

Judges McGEE and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 APRIL 2010)

DARDEN v. DARDEN No. 09-994	Guilford (03CVD11745)	Vacated and remanded
E.B. HARRIS, INC. v. WIGGINS No. 09-169	Warren (07CVD91)	Dismissed in part, remanded in part
GAMEWELL v. GAMEWELL No. 09-1186	Iredell (94CVD2058)	Affirmed
IN RE B.C.M. No. 09-1470	Iredell (07JT115)	Affirmed
IN RE E.T.T. No. 09-1520	Nash (07JA90-94)	Affirmed
IN RE J.M. No. 09-1285	Johnston (06JT22)	Reversed and Remanded
IN RE K.P., M.P., T.P. No. 09-1473	Warren (08JT25-27)	Affirmed
IN RE L.B.G. No. 09-1498	Yancey (07J55)	Affirmed
IN RE L.K.M. & L.R.M. No. 09-1531	Lenoir (07JT101-102)	Affirmed
IN RE LO.H. & LA.J. No. 09-1442	Durham (08J363-364)	Affirmed
IN RE M.T.T. No. 09-1148	Richmond (07JT54)	Vacated
IN RE S.L. & S.L. No. 09-1445	Cumberland (07JA346-347)	Vacated and remanded
IN RE S.T.F. No. 09-1569	Wake (09JA105)	Affirmed
IN RE T.E.S. No. 09-1556	Cleveland (08JA/JT166)	Affirmed
IN RE Z.H. No. 09-1570	Currituck (06J8)	Affirmed
IN RE Z.T. & E.T. No. 09-1576	Cumberland (05JT629-630)	Affirmed
JOHNSON v. NASH CMTY. COLL. No. 09-57	Nash (08CVS878)	Affirmed
LLULL v. ROSE FURN. No. 09-804	Indus. Comm. (436752)	Affirmed

LONG v. CITY OF CHARLOTTE No. 09-1344	Indus. Comm. (763059)	Affirmed
LUCAS v. ROCKINGHAM CNTY. SCHS. No. 09-641	Indus. Comm. (TA16452)	Affirmed
ROCKINGHAM CNTY. DSS v. TATE No. 09-1071	Rockingham (98CVD2183)	Vacated
STATE v. McFADDEN No. 09-1145	Nash (08CRS53271) (08CRS53270)	No Error
STATE v. MOORE No. 09-1235	Caldwell (07CRS51319)	No Error
STATE v. RICE No. 09-1099	Mecklenburg (07CRS249456)	No Error
STATE v. SMITH No. 09-964	Onslow (08CRS54648)	New trial
STATE v. TURNAGE No. 07-562-2	Wake (03CRS34115) (03CRS33741) (03CRS34114)	Remanded for Judgment
STATE v. WHITE No. 09-1149	Guilford (07CRS88251)	No prejudicial error
WASHINGTON v. MAHBUBA No. 09-968	Forsyth (08CVD9006)	Dismissed

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

FIRST CHARTER BANK, TRUSTEE OF THE LAST WILL AND TESTAMENT OF JOSEPH F. CANNON, DATED APRIL 26, 1932, PETITIONER v. AMERICAN CHILDREN'S HOME, STONEWALL JACKSON YOUTH DEVELOPMENT CENTER, THE MASONIC HOME FOR CHILDREN AT OXFORD, INC., BOY'S AND GIRLS' CLUB OF CABARRUS COUNTY, INC., NAZARETH CHILDREN'S HOME, INC., CONCORD FIRE DEPARTMENT, BARIUM SPRINGS HOME FOR CHILDREN, THE CHILDREN'S HOME, INC., FOREST HILL UNITED METHODIST CHURCH, GRANDFATHER HOME FOR CHILDREN, INC., STACY C. EGGERS, IV, AS ADMINISTRATOR CTA OF THE ESTATE OF ANNIE L. CANNON, JOSEPH ERVIN MORRIS, AS EXECUTOR OF THE ESTATE OF MARY CANNON MORRIS, R. MICHAEL ALLEN, AS ADMINISTRATOR CTA OF THE ESTATE OF JOSEPH F. CANNON, JR., AND JOHN DOE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNE CANNON STOUFFER, RESPONDENTS

No. COA09-1232

(Filed 4 May 2010)

1. Declaratory Judgments— standard of review—motion to determine beneficiaries—evidence outside of pleadings considered

The standard of review for an order or judgment in a nonjury declaratory judgment action was used by the Court of Appeals in a trust action where respondent-appellant asserted that a motion by petitioner-trustees was in effect a motion for judgment on the pleadings. The trial court clearly asserted that it carefully reviewed the pleadings and attached exhibits as well as all other matters of record and adjudicative facts.

2. Trusts— virtual representative of estate—no one actually seeking to represent estate

The trial court did not err in a trust matter when it found that the petitioner-trustee was not able to locate a person willing to reopen one of the estates involved or to serve as a representative. While a nephew-by-marriage filed a "Suggestion of Want of Jurisdiction," neither he nor anyone else actually sought to be named as personal representative of that estate.

3. Trusts— virtual representation of missing estate—substantially similar to other estates

The trial court did not err in a declaratory judgment action to interpret a trust by determining that three other estates could represent a missing estate. The respondent-appellant did not provide any argument as to how the estates involved differed in terms relevant to the question before the trial court.

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

4. Trusts— virtual representation—no conflict of interest

The trial court did not err when it found no conflict of interest between estates represented in an action to interpret a trust and another estate virtually represented by those estates where there was no evidence to support such an assertion.

5. Appeal and Error— preservation of issues—no assignment of error, argument or authority

Arguments in a declaratory judgment trust action relating to the ripeness of the controversy for adjudication were not addressed where they were not assigned error, argued in the briefs, or supported with authority.

6. Trusts— distribution of corpus—settlor's intention

The trial court did not err in a declaratory judgment action to interpret a trust by determining that the Settlor intended that the corpus of the trust remaining after 99 years should be distributed equally among the then-entitled charitable beneficiaries of the trust, rather than among the residuary beneficiaries of the estate.

Judge HUNTER, JR., Robert N., concurring.

Appeal by respondent Joseph Ervin Morris, as Executor of the Estate of Mary Cannon Morris, from order and judgment entered 23 February 2009 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 9 February 2010.

Moore & Van Allen, PLLC, by Robert C. Bowers, Tonya L. Mitchell, and Andrea C. Chomakos, for petitioner-appellee.

Roy Cooper, Attorney General, by Gail E. Dawson, Special Deputy Attorney General, for respondent-appellee Stonewall Jackson Youth Development Center.

Edmundson & Burnette, L.L.P., by James T. Duckworth, III, for respondent-appellee The Masonic Home for Children at Oxford, Inc.

Hamilton Moon Stephens Steele & Martin, PLLC, by Keith J. Merritt, and City Attorney's Office, by Albert M. Benshoff, for respondent-appellee Concord Fire Department.

Womble Carlyle Sandridge & Rice, PLLC, by Elizabeth K. Arias and Sarah L. Buthe, for respondents-appellees The Children's Home, Inc., Nazareth Children's Home, Inc., and Barium Springs Home for Children.

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

Hartsell & Williams, PA, by Samuel F. Davis, Jr., for respondent-appellee Forest Hill United Methodist Church.

Respass & Jud, by W. Russ Johnson, III and W. Wallace Respass, Jr., for respondent-appellee Grandfather Home for Children, Inc.

Eggers, Eggers, Eggers, & Eggers, by Stacy C. Eggers, IV, for respondent-appellee Stacy C. Eggers, IV, as Administrator CTA of the Estate of Annie L. Cannon.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Adam P.M. Tarleton and H. Arthur Bolick, II, for respondent-appellant Joseph Ervin Morris, as Executor of the Estate of Mary Cannon Morris.

MARTIN, Chief Judge.

Our recitation of the facts and procedural history of the case is limited to those events deemed relevant to the issues before us on appeal. When Joseph F. Cannon ("Settlor") died in 1939, he was survived by his wife, Annie L. Cannon, and their three children, Anne Cannon Reynolds (later Anne Cannon Stouffer), Mary E. Cannon (later Mary Cannon Morris), and Joseph F. Cannon, Jr. Prior to his death, Settlor executed a last will and testament dated 26 April 1932 (the "Will"), a codicil to the Will dated 9 June 1938 (the "First Codicil"), and a second codicil dated 8 December 1938 (the "Second Codicil").

The Will devised real and personal property to several named persons, including Settlor's wife and three children, and devised \$1,000 each to several named charitable and service organizations and to Settlor's "trusted and efficient secretary," Clara Gillon. The Will further designated that "the rest, residue and remainder" of Settlor's estate should be divided in "four equal parts" among Settlor's wife and three children, with his wife's share "turned over to [her] as soon as practicable, to be hers absolutely," and his children's shares to be held in trust and "turn[ed] over and deliver[ed]" to each child "absolutely and fully discharged of any conditions whatsoever" "as each child reaches the age of twenty-eight years."

The First Codicil directed the executors of Settlor's estate to "turn over to the Citizens Bank and Trust Company, Concord, North Carolina, all stock held by [Settlor] in said Citizens Bank and Trust Company," and "to hold said stock for a period of ninety-nine (99)

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

years" in a trust designated as "The Joseph F. Cannon Christmas Trust" (the "Christmas Trust"). Citizens Bank and Trust Company ("petitioner-trustee")¹ was appointed as trustee of the Christmas Trust and directed to "disperse annually the income from such stock held in said trust for the purpose of giving the inmates of [ten named charitable and service] institutions happiness and cheer at Christmas Time." Each of the ten named institutions was to receive "[t]en per cent (10%) of the income [from the Christmas Trust] annually." Settlor directed "the trustees of the various [charitable and service] institutions named to spend the amount in such a manner that it will give the inmates the most cheer and pleasure during the Yuletide Season." In the event that any of the named institutions "cease[d] to exist, or should the trustees, or superintendents, or managers of any of the [named] institutions fail to carry out [Settlor's] directions as to the dispensation of the above fund," petitioner-trustee was directed to "divert the part of such institution to some other worthy institution and pay out same to them as long as they comply with the provisions [Settlor] ha[d] made." The First Codicil also provided that petitioner-trustee "shall be the sole and final judge in matters pertaining to the administration of this Fund." All parties agree that the First Codicil does not expressly state what is to become of the remaining corpus of the Christmas Trust upon the expiration of the 99-year Trust term.

The Second Codicil made additional devises of real and personal property and revoked several provisions of the Will. Among the revoked provisions were Settlor's devises of \$1,000 each to the charitable and service organizations named in the Will, some of which had since been named as beneficiaries of the Christmas Trust in the First Codicil. However, Settlor did not revoke his devise of \$1,000 to his "trusted and efficient secretary," Clara Gillon, and further provided that it was his "desire that [his] efficient secretary Miss Clara Gillon be retained as secretary to [his] estate at her present salary until said estate [wa]s finally settled." Settlor then directed that three hundred shares of stock held by him in Wiscassett Mills be "set aside" and "placed in trust" (the "Gillon Trust") with the Citizens Bank and Trust Company, Concord, North Carolina, which also served as trustee of the Christmas Trust. With respect to the Gillon Trust, petitioner-trustee was directed to "receive dividends from same and pay over immediately to Miss Clara Gillon same as long as she may live, deducting lawful charges from same for handling." Settlor further

1. According to the record, petitioner First Charter Bank previously conducted business as "Citizens Bank and Trust Company," and presently conducts business as "Fifth Third Bank."

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

provided, “[a]t the death of Miss Clara Gillon[,] I direct that the above shares of the Wiscassett Mills *revert back to the heirs of my estate*, share and share alike.” (Emphasis added.)

On 18 July 2007, petitioner-trustee filed a petition for declaratory judgment in which it requested, among other things, that the trial court determine whether petitioner-trustee “may . . . at the termination of the [Christmas] Trust, distribute the Trust’s assets to charitable entities as [it] in its discretion deems appropriate, consistent with [N.C.G.S.] § 36C-4-405(a).” In addition, “in an effort to ensure that any and all potentially interested parties [we]re represented,” on 2 November 2007 and 25 September 2008, petitioner-trustee amended its petition and named as respondents to the action the estates of Settlor’s wife and three children—designated as Stacy C. Eggers, IV, as Administrator CTA of the Estate of Settlor’s wife Annie L. Cannon; John Doe, as personal representative of the Estate of Anne Cannon Stouffer; Joseph Ervin Morris, as Executor of the Estate of Mary Cannon Morris; and R. Michael Allen, as Administrator CTA of the Estate of Joseph F. Cannon, Jr.—and the current beneficiaries of the Christmas Trust, which include American Children’s Home, Stonewall Jackson Youth Development Center, The Masonic Home for Children at Oxford, Inc., Boys and Girls Club of Cabarrus County, Inc., Nazareth Children’s Home, Inc., Concord Fire Department, Barium Springs Home for Children, The Children’s Home, Inc., Forest Hill United Methodist Church, and Grandfather Home for Children, Inc. (collectively the “charitable beneficiaries”).

On or about 29 October 2008, petitioner-trustee filed its Motion to Ascertain Remainder Beneficiaries of the Christmas Trust. Petitioner-trustee requested that the trial court “declar[e] that the [Christmas] Trust’s remainder beneficiaries will be the then-entitled charitable beneficiaries receiving income from the Trust at the expiration of the Trust term,” stating that “[r]esolution of this issue is beneficial and necessary to guide the [petitioner-t]rustee’s ongoing administration of the Trust for the remaining 30 years of its 99-year term when the remainder interests will be distributed.” On 23 February 2009, the trial court entered its Order and Judgment on petitioner-trustee’s Motion to Ascertain Remainder Beneficiaries of the Christmas Trust. The trial court first determined that the estate of Settlor’s daughter Anne Cannon Stouffer (the “Stouffer Estate”)—for which petitioner-trustee “was not able to locate a person willing to re-open the [estate] or to serve as [its] personal representative”—could be “virtually” represented pursuant to N.C.G.S. § 36C-3-304 “by each of

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

and any one of" the estates of Settlor's wife and Settlor's two other children (collectively the three "North Carolina Estates"). The trial court then concluded:

5. Under North Carolina law, a determination that the Christmas Trust is a wholly charitable trust is supported on multiple grounds:

- a. The Settlor did not retain a reversionary interest in the Christmas Trust because a right of reversion must be expressly stated in the granting instrument. *See Station Associates, Inc. v. Dare County*, 350 N.C. 367, 513 S.E.2d 789 (1999) (holding that the North Carolina Supreme Court does not recognize "reversionary interests in deeds that do not contain express and unambiguous language of reversion."). Thus, the Settlor transferred fee simple ownership of the assets of the Christmas Trust.
- b. The Court's responsibility is to "ascertain the intent of the settlor and to carry out that intent . . . deriving the settlor's intent from the language and purpose of the trust, construing the document as a whole." *Davenport v. Central Carolina Bank & Trust Co.*, 161 N.C. App. 666, 672[, 589 S.E.2d 367, 370] (2003). The Settlor's testamentary plan set forth in the Will, First Codicil and Second Codicil establishes that the Settlor's intent in creating the Christmas Trust was to provide for a charitable trust to benefit various charitable institutions. This was the Settlor's intent with respect to the distribution of income from the Christmas Trust during the 99-year period, as well as the distribution of any remaining assets at the expiration of the 99-year period.
- c. N.C. Gen. Stat. § 36C-4A-1(b) states that "notwithstanding any provisions in the laws of this State or in the governing instrument to the contrary," the governing instrument of each trust that is a nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code is considered to contain a provision stating that "[u]pon any dissolution, winding up, or liquidation of the trust, its assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or shall be distributed to the federal government, or a state or local government for a public purpose."

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

- d. N.C. Gen. Stat. § 36C-4-413 states that if a “charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful: (1) The trust does not fail, in whole or in part; (2) The trust property does not revert to the settlor or the settlor’s successors in interest; and (3) The court may apply *cy pres* to modify . . . the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor’s charitable purposes.”
- e. In accordance with N.C. Gen. Stat. §§ 36C-4A-1(b) and 36C-4-413, the fact that the language of the First Codicil does not contain specific instructions regarding disposition of the assets of the Christmas Trust upon the expiration of the 99-year period does not cause the charitable gift to the Christmas Trust to fail and the assets of the Christmas Trust to revert to the Settlor’s residuary beneficiaries because the Christmas Trust is a nonexempt charitable trust under section 4947(a)(1) of the Code and the doctrine of *cy pres* would permit the Court to modify the Christmas Trust to avoid this result.

Accordingly, the trial court decreed that the estates of Settlor’s wife, Annie L. Cannon, and three children, Anne Cannon Stouffer, Mary Cannon Morris, and Joseph F. Cannon, Jr. (collectively the four “residuary beneficiaries”), “had and have no interest in the Christmas Trust, and are not and will not be remainder beneficiaries of the Christmas Trust, to the extent that there exists any remainder interest in the Christmas Trust.” On 25 March 2009, respondent-appellant Joseph Ervin Morris, as Executor of the Estate of Mary Cannon Morris, gave timely notice of appeal from the trial court’s 23 February 2009 Order and Judgment.

Appellate review is limited to those questions “clearly” defined and “presented to the reviewing court” in the parties’ briefs, in which “arguments and authorities upon which the parties rely in support of their respective positions” are to be presented. *See* N.C.R. App. P. 28(a) (amended Oct. 1, 2009). “It is not the role of the appellate courts . . . to create an appeal for an appellant,” *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh’g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), nor is it “the duty of the appellate courts to supplement an appellant’s brief with legal authority or arguments not contained therein.” *See State v. Hill*, 179 N.C. App. 1, 21, 632 S.E.2d 777, 789 (2006). Accordingly, the questions properly preserved

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

and presented for appellate review in this case are as follows: (I) whether the trial court erred when it determined that the Stouffer Estate and all beneficiaries thereof and all persons interested therein could be “virtually” represented pursuant to N.C.G.S. § 36C-3-304 “by each of and any one of” the three North Carolina Estates; and (II) whether the trial court erred when it determined that respondent-appellant “had and ha[s] no interest in the Christmas Trust, and [is] not and will not be [a] remainder beneficiar[y] of the Christmas Trust, to the extent that there exists any remainder interest in the Christmas Trust,” upon the expiration of the Trust.

“The standard of review of a judgment rendered under the declaratory judgment act is the same as in other cases.” *Miesch v. Ocean Dunes Homeowners Ass’n*, 120 N.C. App. 559, 562, 464 S.E.2d 64, 67 (1995), *disc. review denied*, 342 N.C. 657, 467 S.E.2d 717 (1996); *see also* N.C. Gen. Stat. § 1-258 (2009) (“All orders, judgment and decrees under [Article 26, ‘Declaratory Judgments,’] may be reviewed as other orders, judgments and decrees.”). “Thus, where a declaratory judgment action is heard without a jury and the trial court resolves issues of fact, the court’s findings of fact are conclusive on appeal if supported by competent evidence in the record, even if there exists evidence to the contrary, and a judgment supported by such findings will be affirmed.” *Miesch*, 120 N.C. App. at 562, 464 S.E.2d at 67; *Nationwide Mut. Ins. Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475 (“The rule thus applicable is that the court’s findings of fact are conclusive if supported by any competent evidence; and a judgment supported by such findings will be affirmed, even though there is evidence which might sustain findings to the contrary, and even though incompetent evidence may have been admitted.”), *disc. review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981). “The function of our review is, then, to determine whether the record contains competent evidence to support the findings; and whether the findings support the conclusions.” *Allison*, 51 N.C. App. at 657, 277 S.E.2d at 475. “However, the trial court’s conclusions of law are reviewable *de novo*.” *Cross v. Cap. Transaction Grp.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (internal quotation marks omitted), *disc. review denied*, 363 N.C. 124, 672 S.E.2d 687 (2009).

[1] In the present case, petitioner-trustee moved the trial court pursuant to N.C.G.S. § 1-253 *et seq.* to “declar[e] that the [Christmas] Trust’s remainder beneficiaries will be the then-entitled charitable beneficiaries receiving income from the Trust at the expiration of the Trust term.” The matter was heard by the trial court without a jury

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

and the court entered its Order and Judgment on 23 February 2009 in which it made findings of fact and conclusions of law on petitioner-trustee's motion. Respondent-appellant asserts petitioner-trustee's Motion to Ascertain Remainder Beneficiaries "was, *in effect*, a motion for judgment on the pleadings under [N.C.G.S. § 1A-1, Rule 12(c),] because no matters outside the pleadings were presented to or considered by the trial court." (Emphasis added.) However, in its 23 February 2009 Order and Judgment from which respondent-appellant appeals, the trial court clearly asserts that it "carefully reviewed the pleadings and the attached exhibits *as well as all other matters of record and adjudicative facts*." (Emphasis added.) The record reveals that the trial court considered matters presented by the parties beyond the pleadings, and made specific findings and conclusions of law in consequence thereof. Thus, we review this matter according to the standard of review for an order or judgment in a non-jury declaratory judgment action as described above.

I.

In 2005, when our General Assembly adopted a revised version of the Uniform Trust Code for North Carolina, it codified the long-recognized doctrine of virtual representation in N.C.G.S. § 36C-3-304. *See* 2005 Sess. Laws 345, 357, ch. 192, § 2; *see also Hales v. N.C. Ins. Guar. Ass'n*, 337 N.C. 329, 336-38, 445 S.E.2d 590, 595-96 (1994) (describing, albeit with disfavor, the development, decline, and revival of the doctrine of virtual representation). N.C.G.S. § 36C-3-304 provides that a "person"—recognized as including an individual, an estate, and a trust, *see* N.C. Gen. Stat. § 36C-1-103(12) (2009)—whose "identity or location is unknown and not reasonably ascertainable," "may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented with respect to the particular question or dispute." N.C. Gen. Stat. § 36C-3-304 (2009).

In the present case, respondent-appellant first argues that the trial court erred in proceeding to determine the issue of who are the remainder beneficiaries of the Christmas Trust because the issue "was not ripe for adjudication because a necessary party was not properly represented before the court." Respondent-appellant contends the Stouffer Estate and all beneficiaries thereof and all persons interested therein could not be "represented and bound by each of and any one of the [three] North Carolina Estates pursuant to

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

[N.C.G.S.] § 36C-3-304” because, at the time of the 5 November 2008 hearing on petitioner-trustee’s Motion to Ascertain Remainder Beneficiaries: (A) the identity and location of the personal representative of the Stouffer Estate was both known and reasonably ascertainable; and (B) the interests of the Stouffer Estate and the interests of the three North Carolina Estates were not “substantially identical.” We disagree.

A.

[2] Respondent-appellant first suggests the trial court erred when it found that “[p]etitioner[-trustee] was not able to locate a person willing to re-open the Stouffer Estate or to serve as a personal representative,” and that, “[a]s the Stouffer Estate has not been re-opened, it has not appeared personally or through its counsel nor otherwise participated directly in this proceeding.”

The trial court found that Wilbur L. Hazlegrove was not a party to the proceeding, but that he “has asserted that he and his relatives have an interest in the Stouffer Estate.” The trial court also found that Mr. Hazlegrove, “who is a member of the Virginia State Bar, did not seek leave to intervene in these proceedings and did not appear at the hearing, although he had actual notice of th[e] proceeding and filed a ‘Suggestion of Want of Jurisdiction,’ ” in which Mr. Hazlegrove “assert[ed] that the [trial c]ourt may lack jurisdiction over certain persons whom Hazlegrove believes may have an interest in th[e] proceeding.” Respondent-appellant does not assign error to these findings and concedes, “[t]o date, . . . to [a]ppellant’s knowledge the Stouffer Estate has not been re-opened, and no administrator, executor, or other personal representative has appeared on behalf of the Stouffer Estate.” However, respondent-appellant asserts that Mr. Hazlegrove—who is said to be a nephew by marriage of Settlor’s daughter, Anne Cannon Stouffer—“attempt[ed] to participate in the proceedings” by filing his 31 October 2008 Suggestion of Want of Jurisdiction. While the parties appear to agree that Mr. Hazlegrove may have an interest in the Stouffer Estate, neither he nor anyone else actually sought to be named as personal representative of the Stouffer Estate. Accordingly, we conclude the trial court was correct when it determined that “[petitioner-trustee] was not able to locate a person willing to re-open the Stouffer Estate or serve as a personal representative. Therefore, the Stouffer Estate, by and through its appropriate representative, is not known or locatable.”

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

B.

[3] Respondent-appellant next suggests the trial court erred by determining that each and any one of the three North Carolina Estates could properly represent the Stouffer Estate pursuant to N.C.G.S. § 36C-3-304 because, he argues, “it is by no means clear” that the interests of the Stouffer Estate and the interests of the North Carolina Estates were “substantially identical.” To bolster this assertion, respondent-appellant claims that, because the residuary beneficiary of the estate of Mary Cannon Morris is said to be the Mary Cannon Morris Charitable Foundation, while the residuary beneficiaries of the Stouffer Estate are said to be “private individuals,” “[t]he interests of an estate whose ultimate beneficiaries are charitable organizations simply cannot be described as ‘substantially identical’ to the interests of a group of private individuals, such as the individuals *allegedly* entitled to share in the residue of the Stouffer Estate.” (Emphasis added.) However, respondent-appellant has failed to provide any argument as to *why* the identity of the residuary beneficiaries of the residuary beneficiaries of Settlor’s Will are in any way relevant to the question at issue in the present case.

According to respondent-appellant, “[t]he ultimate question in this case is this: Who should receive the assets of the Joseph F. Cannon Christmas Trust at the end of the Trust’s express term of 99 years, where the Trust is silent as to remainder beneficiaries?” Respondent-appellant concedes that the answer to this question is limited to one of two choices: either (1) the Christmas Trust corpus should be distributed to “the current income beneficiaries or to charities or governmental entities selected by [petitioner-trustee] to replace any of the current income beneficiaries prior to the end of the Trust term,” *or* (2) the remaining corpus should “revert to the residuary beneficiaries of Joseph F. Cannon’s estate, including [respondent-appellant] as executor of the estate of Joseph F. Cannon’s daughter, Mary Cannon Morris.” In other words, as respondent-appellant admits and the trial court has recognized, respondent-appellant asserts his right to take a share of the remaining corpus of the Christmas Trust due to his identity as the executor of the estate of a residuary beneficiary of Settlor’s Will. This identity is one which the estate represented by respondent-appellant *shares equally* with the Stouffer Estate according to the express terms of Settlor’s Will, since the parties agree and the record reflects that Settlor’s Will designated that “the rest, residue and remainder” of Settlor’s estate should be divided “into *four equal parts*” among his

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

wife and three children, (emphasis added), and since the estate represented by respondent-appellant, like the Stouffer Estate, seeks to claim one-fourth of the remaining corpus of the Christmas Trust as a residuary beneficiary of Settlor's Will. In the absence of any argument as to how the estates of Settlor's two daughters differ in terms that are relevant to the question before the trial court below, we conclude the trial court was correct when it found that "[t]he interests held by the North Carolina Estates and the Stouffer Estate in this proceeding are substantially identical."

[4] Respondent-appellant also attempts to challenge the trial court's decision to allow the North Carolina Estates to virtually represent the Stouffer Estate based on the unsubstantiated assertion in his brief that the trial court "may have been subjecting the North Carolina Estates to further litigation" as a result of "hostility toward these proceedings" by the Stouffer Estate. However, the record contains no evidence to support such an assertion, and, in the absence thereof, we cannot conclude the trial court erred when it found that "[n]o conflict of interest exists between any of the North Carolina Estates and the Stouffer Estate." Therefore, we conclude the trial court did not err when it determined that the Stouffer Estate could be represented and bound by each and any one of the North Carolina Estates.

[5] Finally, at oral argument, respondent-appellant attempted to raise issues with respect to the ripeness of the controversy for adjudication for reasons other than that stated in his assignment of error and discussed in his brief, i.e., that the matter below was "not ripe for adjudication because a necessary party was not properly represented before the court." In its order the trial court concluded: "This matter is ripe for adjudication because a determination as to whether the Christmas Trust is charitable affects the current and ongoing administration of the Christmas Trust." There has been no assignment of error to this conclusion of law, nor have the parties argued in their briefs, or presented supporting authority for, the issue of ripeness other than with respect to the trial court's determination that the Stouffer Estate could be virtually represented by each and any one of the three North Carolina Estates. Therefore, as instructed in *Viar*, we decline to construct arguments for the parties or to address issues not presented in the parties' briefs. See *Viar*, 359 N.C. at 402, 610 S.E.2d at 361; N.C.R. App. P. 10(c)(1) (amended Oct. 1, 2009); N.C.R. App. P. 28(a) (amended Oct. 1, 2009).

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

II.

[6] Respondent-appellant next contends the trial court erred by determining that, if any principal of the Christmas Trust remained at the expiration of the Trust term, Settlor intended that the remaining Trust corpus should be distributed equally among the then-entitled charitable beneficiaries of the Trust, rather than among the residuary beneficiaries of his estate. "The intent of the testator is the polar star that must guide the courts in the interpretation of a will." *Coppedge v. Coppedge*, 234 N.C. 173, 174, 66 S.E.2d 777, 778, *reh'g denied*, 234 N.C. 747, 67 S.E.2d 463 (1951). Accordingly, "[i]t is a fundamental rule that, when interpreting wills and trust instruments, courts must give effect to the intent of the testator or settlor, so long as such intent does not conflict with the demands of law and public policy." *Wachovia Bank v. Willis*, 118 N.C. App. 144, 147, 454 S.E.2d 293, 295 (1995) (citing *N.C. Nat'l Bank v. Goode*, 298 N.C. 485, 489, 259 S.E.2d 288, 291 (1979)). In order to give effect to a testator's intent when construing a will, the intent which controls is "that which is gleaned from the writing of the testament in its entirety. Every word and phrase in the instrument has its place and none ought to be rejected. Each should be given a meaning that, wherever possible, harmonizes with the other. Every string should give its sound." *Goode*, 298 N.C. at 489, 259 S.E.2d at 291 (internal quotation marks omitted); *Heyer v. Bulluck*, 210 N.C. 321, 326, 186 S.E. 356, 359 (1936) (" 'A word is not a crystal, transparent and unchangeable; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used . . . ' " (quoting *Towne v. Eisner*, 245 U.S. 418, 425, 62 L. Ed. 372, 376 (1918))); *see also Coppedge*, 234 N.C. at 174, 66 S.E.2d at 778 ("This intent is to be gathered from a consideration of the will from its four corners . . . "). Similarly, "[t]he intent of one who creates a trust is to be determined by the language he chooses to convey his thoughts, the purpose he seeks to accomplish, and the situation of the several parties to or benefited by the trust." *Callaham v. Newsom*, 251 N.C. 146, 149, 110 S.E.2d 802, 804 (1959); *see also Davenport v. Cent. Carolina Bank*, 161 N.C. App. 666, 672, 589 S.E.2d 367, 370 (2003) ("In construing the terms of a trust, '[o]ur responsibility is to ascertain the intent of the settlor and to carry out that intent . . . deriv[ing] the settlor's intent from the language and purpose of the trust, construing the document as a whole.' " (omission and alterations in original) (quoting *Wheeler v. Queen*, 132 N.C. App. 91, 95, 510 S.E.2d 195, 198, *disc. review denied*, 350 N.C. 385, 536 S.E.2d 320 (1999))).

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

"[T]he law of trusts recognizes that equity will infer an intent to give the remainder interest in the [trust] principal to the income beneficiary when there is no express disposition of the principal provided for by the testator." *Betts v. Parrish*, 312 N.C. 47, 56, 320 S.E.2d 662, 667 (1984) (citing George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 182, at 357 (rev. 2d ed. 1979)). "Absent an express disposition of the principal [of a trust] by the testator, an implied gift can result if there is an implied intent on the part of the testator that an additional interest be given to an income beneficiary." *Id.* (citing Bogert & Bogert, *The Law of Trusts and Trustees* § 182, at 354-55). "Whether or not a gift is implied depends upon the testator's intention derived from his entire plan of giving in the will." Bogert & Bogert, *The Law of Trusts and Trustees* § 182, at 358.

"[T]he doctrine of devise or bequest by implication is well established in our law." *Finch v. Honeycutt*, 246 N.C. 91, 98, 97 S.E.2d 478, 484 (1957). However, "[d]espite long-standing acceptance of this doctrine, a gift by implication is not favored in the law and cannot rest upon mere conjecture." *Wing v. Wachovia Bank & Trust Co.*, 301 N.C. 456, 464, 272 S.E.2d 90, 96 (1980). Nevertheless, "[i]f a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express or formal words," "the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." *Finch*, 246 N.C. at 98, 97 S.E.2d at 484 (quoting *Burcham v. Burcham*, 219 N.C. 357, 359, 13 S.E.2d 615, 616 (1941)).

Here, the parties do not dispute that, in the First Codicil, Settlor instructed that the assets comprising the Christmas Trust were to be held in trust "for a period of ninety-nine (99) years." Neither do they dispute that Settlor empowered petitioner-trustee to divert the Trust income designated for the benefit of any of the ten named charitable institutions "to some other worthy institution and pay out same to them" "[s]hould any of the [ten named charitable] institutions cease to exist, or should the trustees, or superintendents, or managers of any of the [named] institutions fail to carry out [Settlor's] directions as to the dispensation" of the Christmas Trust. Thus, based on the plain language of Settlor's First Codicil, it seems evident that Settlor intended that the Trust should keep to its charitable purpose "of giving the inmates of the mentioned institutions happiness and cheer at Christmas Time" for the duration of the 99-year Trust term.

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

Additionally, as the trial court found and the evidence in the record shows, in Settlor's Will, Settlor directed that the "rest, residue and remainder" of his estate should be divided into "four equal parts" and "*turned over*" to his wife and three children, in accordance with the terms of the Will. (Emphasis added.) Similarly, when designating which assets were to comprise the Christmas Trust in the First Codicil, Settlor "direct[ed] that [his] Executors . . . *turn over* to the Citizens Bank and Trust Company, Concord, North Carolina, all stock held by [him] in said Citizens Bank and Trust Company." (Emphasis added.) Conversely, when Settlor created the Gillon Trust in the Second Codicil, he directed that (1) the assets comprising the Gillon Trust should be "*set aside*" and held in trust for the income beneficiary Clara Gillon, and (2) the assets should "*revert back* to the heirs of [his] estate, share and share alike" upon the death of the income beneficiary. (Emphases added.) Thus, although Settlor used the Second Codicil to revoke and revise several provisions of his Will, Settlor did not choose to revise the establishing language of the Christmas Trust in the First Codicil to indicate that the assets of the Christmas Trust should "revert back" to his residuary beneficiaries upon the expiration of the Christmas Trust, even though he chose to provide, using such language, that the assets of the Gillon Trust would "revert back" upon the expiration of that trust. Since Settlor directed that the assets held in the Christmas Trust were to be "turn[ed] over" to petitioner-trustee, and since Settlor did not modify the establishing language of the Trust or choose to indicate that the assets of the Christmas Trust should "revert back" to the residue of his estate when he later created the Gillon Trust which *itself* included such an express directive, we believe the trial court correctly concluded that the language of Settlor's whole will indicates that Settlor did not intend for the remaining assets held in the Christmas Trust to "revert back" to his residuary beneficiaries at the expiration of the Trust.

Next, the evidence before the trial court shows that Settlor specifically directed that the "rest, residue and remainder of [his] estate [shall be held] *for the benefit of* [his] wife, Annie L. Cannon, and [his] daughters, Anne Cannon Reynolds, and Mary E. Cannon, and [his] son, Joseph F. Cannon, Jr." and divided "into four equal parts." (Emphasis added.) Settlor further provided that one of the four parts of the residuary estate "shall be turned over to [his] wife, Annie L. Cannon, *as soon as practicable to be hers absolutely*," and directed that the remaining three parts "shall [be] turn[ed] over and deliver[ed] to" each of his three children "as each child reaches the

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

age of twenty-eight years” “to be the property of such child *absolutely and fully discharged* of any conditions whatsoever;” “[Settlor’s] purpose and intention being that *final settlement be made with each child as she or he reaches the age of twenty-eight years*, at which age they shall have gained a more mature knowledge of the value of their property.” (Emphases added.) Thus, because Settlor directed that his wife’s part of the residuary estate would be turned over “as soon as practicable to be hers absolutely,” and that his children’s “final settlement” would be made “as she or he reaches the age of twenty-eight years,” a reading of the plain language requires a conclusion that Settlor did not conceive of nor intend for there to be any further assets directed to the residue of his estate after his children reached the age of twenty-eight years, with the exception of the assets held in the Gillon Trust in the event that Miss Gillon were to live beyond any or each of his children’s twenty-eighth birthdays. Moreover, it “cannot reasonably be supposed” that Settlor would have believed that his wife and children would live to see the expiration of the 99-year Trust term and, thus, Settlor would have known that his wife and children would not derive any benefit from receiving the remaining corpus of the Christmas Trust through his residuary estate. *See Burney v. Holloway*, 225 N.C. 633, 637, 36 S.E.2d 5, 8 (1945) (stating that, in order for a court to determine that a testator made a devise or bequest by implication, the “[p]robability must be so strong that a contrary intention cannot reasonably be supposed to exist in testator’s mind” (internal quotation marks omitted)). Since Settlor created the trust for his residuary estate for the express purpose of benefitting his wife and three children, we must conclude that a review of Settlor’s whole will demonstrates that Settlor did not intend for the remaining corpus of the Christmas Trust to pass to his residuary beneficiaries. Instead, we agree with the trial court that Settlor’s Will, the First Codicil, and the Second Codicil, when read together, demonstrate that Settlor must have intended that, after the charitable beneficiaries enjoyed a guaranteed period of ninety-nine years of uninterrupted support from the income of the Christmas Trust, any remaining Trust corpus was intended to be distributed to the then-entitled charitable beneficiaries. Therefore, by concluding that the residuary beneficiaries “had and have no interest in the Christmas Trust, and are not and will not be remainder beneficiaries of the Christmas Trust, to the extent that there exists any remainder interest in the Christmas Trust,” the trial court properly carried into effect Settlor’s intention, which was not bequeathed by express and formal words, *see Burcham*, 219 N.C. at 359, 13 S.E.2d at 616, that the

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

charitable beneficiaries of the Christmas Trust so designated at the time of its expiration should receive any remaining corpus of the Christmas Trust.

Affirmed.

Judge JACKSON concurs.

Judge HUNTER, JR. concurs with separate opinion.

HUNTER, JR., Robert N., Judge, concurring.

With regard to the application of *cy pres*, I reach the same result as the majority through a slightly different logic, which may have some importance to a future application of the doctrine of *cy pres*. Under N.C. Gen. Stat. § 36C-1-112 (2009), “[t]he rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.” The court below, in my view, erred in selecting *Station Assoc., Inc. v. Dare County*, 350 N.C. 367, 513 S.E.2d 789 (1999), as authority for the proposition that fee simple ownership of the assets of the Christmas Trust was transferred by virtue of the language of the First Codicil. I disagree with this finding because *Dare County* concerns the interpretation of a deed and not a will. The majority’s opinion avoids this error.

It is my opinion that the proper construction of the Will in the case *sub judice* involves the application of the presumption against intestacy, the presumption that a person knows the law, and the consequences of the application of these presumptions to the fact that the testator here failed to include in the Will or the First or Second Codicils a comprehensive residuary clause. *Austin v. Austin*, 160 N.C. 367, 368, 76 S.E. 272, 272 (1912) (“The presumption is against intestacy.”). As the majority correctly notes, the residuary clause in the Will served as a “final settlement” with the residue beneficiaries upon their reaching the age of twenty-eight. Given the definite time frame for the termination of the accumulation of the residue, it is reasonable, to me, to conclude that Item Eleventh is not comprehensive in its ability to dispose of property acquired by the estate after the “final settlement” date. Thus, since the residuary clause has expired and cannot now devise to the residuary beneficiaries any more property, it is apparent to me that the only manner in which the heirs of

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

Joseph Cannon can take the remainder interest in the Christmas Trust is through intestacy.

The need for a court to declare the intent of the testator only arises where there is no direction from the testator. Had the Will contained a more comprehensive residuary clause, even if the clause was not contained within specific language of the First Codicil establishing the Christmas Trust, then I believe such a residuary clause would fully dispose of the remainder interest here at issue. *See Ford v. McBrayer*, 171 N.C. 420, 88 S.E. 736 (1916) (A “residuary clause . . . disposes of all other property of the testator.”); *Hollowell v. Hollowell*, 18 N.C. App. 279, 196 S.E.2d 820 (1973) (property devised in codicil subject to residuary clause of effective will). However, as discussed by the majority, the method chosen by Joseph Cannon in Item Eleventh does not comprehensively dispose of the residuary estate.

Appellants argue that this Court should apply a theory of resulting trust to the corpus of the Christmas Trust, which would result in the bank shares constituting the trust to revert to the residuary beneficiaries of the Will. In support of this position, appellants cite The Restatement (First) of Trusts:

Where the owner of property gratuitously transfers it upon a trust which is properly declared but which is fully performed without exhausting the trust estate, the trustee holds the surplus upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust of the surplus should arise.

Restatement (First) of Trusts § 430 (1935).²

However, even if we were to apply this rule in order to achieve the result sought, the trial court would have to determine that part of Joseph Cannon's estate passed through intestacy. Furthermore, the court would have to ignore the legal presumption that Joseph Cannon did not know the law exigent in 1932, and that he would not have intended this law to be applied in interpreting his intention.

In North Carolina, now and in 1932, there is a presumption against intestacy, and the burden is on an heir claiming intestacy to rebut such a presumption. *Austin*, 160 N.C. at 368, 76 S.E. at 272. Other than the language of Item Eleventh, there is no evidence intro-

2. Appellants point out that this provision of the Restatement was published in 1935, three years before the execution of the First Codicil.

FIRST CHARTER BANK v. AM. CHILDREN'S HOME

[203 N.C. App. 574 (2010)]

duced by the appellants to rebut the presumption that Joseph Cannon did not intend to dispose of his entire estate through the Will. The contention that the Will, upon the expiration of the Christmas Trust, requires that the corpus of the trust be conveyed to the residuary beneficiaries, supports, rather than rebuts, the application of this presumption.

As this State's Supreme Court has said, where there is "an important failure to complete the scheme of testamentary disposition so as to provide for contingencies too obvious to be ignored, especially those which might interfere with the expressed testamentary intent with regard to the particular legacy or devise, raises a strong presumption that the testator understood himself to be making a final disposition in his gift of the property." *Coddington v. Stone*, 217 N.C. 714, 720, 9 S.E.2d 420, 424 (1940). Having no evidence to the contrary, the trial court here was justified in using this presumption to imply a gift of the corpus to the income beneficiaries.

In my view, there are two classes of possible income beneficiaries of the corpus in this case: the first is the charitable institutions to which the income was given to distribute to their wards, inmates, or employees; and the other is to the wards, inmates, and employees themselves. Because it is my opinion that the disposition of the corpus of the trust to the latter would be "impractical" within the meaning of *cy pres*, I think that the trial court was justified in applying *cy pres* and finding that the remainder interest of the trust should be distributed in 2039 among those charitable organizations receiving annual distributions from the Christmas Trust.

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

HOPE—A WOMEN'S CANCER CENTER, P.A., AND RALEIGH ORTHOPAEDIC CLINIC, P.A., PLAINTIFFS v. STATE OF NORTH CAROLINA; MICHAEL F. EASLEY, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; DEMPSEY E. BENTON, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HIS OFFICIAL CAPACITY; DAN A. MYERS, M.D., CHAIRMAN OF THE NORTH CAROLINA STATE HEALTH COORDINATING COUNCIL, IN HIS OFFICIAL CAPACITY; JEFF HORTON, ACTING DIRECTOR, DIVISION OF HEALTH SERVICE REGULATION, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HIS OFFICIAL CAPACITY; AND LEE B. HOFFMAN, CHIEF OF THE CERTIFICATE OF NEED SECTION, DIVISION OF HEALTH SERVICE REGULATION, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY, DEFENDANTS

No. COA09-844

(Filed 4 May 2010)

1. Declaratory Judgment— Certificate of Need law—summary judgment properly denied

The trial court did not err in denying plaintiffs' motion for judgment on the pleadings seeking a declaratory judgment that provisions of the Certificate of Need (CON) law were unconstitutional as applied to plaintiffs. The CON law does not improperly delegate legislative authority to the North Carolina State Coordinating Council (Council) as the Council's role is strictly advisory and the General Assembly has provided an adequate system of procedural safeguards.

2. Constitutional Law— substantive due process—Certificate of Need law—no violation

The Certificate of Need (CON) law did not violate plaintiffs' constitutional right to substantive due process of law. The legitimate purpose of enacting the CON law was to protect the health and welfare of North Carolina citizens by providing affordable access to necessary health care. Furthermore, it is a reasonable belief that this goal would be achieved by allowing approval of new institutional health services only when a need for such services had been determined and the CON law contains detailed explanations as to how the requirement of a CON based on need promotes the public welfare.

3. Constitutional Law— Certificate of Need law—right of access to the courts—lack of standing—access not denied

Plaintiffs did not have standing to assert the argument that the Certificate of Need (CON) law, in connection with the Admin-

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

istrative Procedures Act and the North Carolina Administrative Code, denied them access to the courts. Moreover, even if plaintiffs had standing, their argument lacked merit as a CON decision is an administrative decision which is not constitutionally entitled to judicial review or appeal.

Appeal by plaintiffs from order entered 26 March 2009 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 January 2010.

Nelson Mullins Riley & Scarborough, L.L.P., by Noah H. Huffstetter, III, Denise M. Gunter, Wallace C. Hollowell, III, Stephen D. Martin, and Elizabeth B. Frock; and North Carolina Institute for Constitutional Law, by Robert F. Orr, Executive Director and Senior Counsel and Jason B. Kay, Senior Staff Attorney, for plaintiffs-appellants.

Roy Cooper, Attorney General, by Mark A. Davis, Special Deputy Attorney General and Angel Gray, Assistant Attorney General, for defendants-appellees.

Bode, Call & Stroupe, L.L.P., by Robert V. Bode and S. Todd Hemphill, for North Carolina Hospital Association, North Carolina Baptist Hospital, and Wake Forest University Health Sciences, amici curiae.

Poyner Spruill LLP, by Kenneth L. Burgess and Jessica M. Lewis, for The North Carolina Health Care Facilities Association, amicus curiae.

K&L Gates LLP, by Gary S. Qualls and William W. Stewart, Jr., for The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System, Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System, High Point Regional Health System, Pitt County Memorial Hospital, Inc., and Rex Hospital, Inc., amici curiae.

North Carolina Justice Center, by Jack Holtzman, for North Carolina Justice Center, amicus curiae.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray, Terrill Johnson Harris, and Allyson Jones Labban, for Mission Hospitals, Inc., WakeMed, and The Moses H. Cone Memorial Hospital Operating Corporation d/b/a Moses Cone Health System, amici curiae.

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

Kirschbaum, Nanney, Keenan & Griffin, P.A., by Frank S. Kirschbaum and Chad Lorenz Halliday, for Asheville Radiology Associates, P.A. and Surgical Care Affiliates, L.L.C., amici curiae.

MARTIN, Chief Judge.

The 2008 State Medical Facilities Plan (“the 2008 Plan”) was developed by the North Carolina Department of Health and Human Services, Division of Health Service Regulation (“the Department”), under the direction of the North Carolina State Health Coordinating Council (“the Council”). The Council’s proposed 2008 Plan was made available to the public for review in the summer of 2007. During this review period, the Council conducted six public hearings and accepted petitions requesting changes to the proposed 2008 Plan.

On 3 August 2007, Hope—A Women’s Cancer Center, P.A. (“plaintiff Center”) filed a petition with the Council. In its petition, plaintiff Center requested the Council to adjust the need determination for dedicated breast MRI scanners to reflect a need for one in Health Service Area I. In support of its request, plaintiff Center argued that the need for a dedicated breast MRI scanner in this service area was great and that it, “with its clinical research program dedicated to the advancement of women’s cancer care through clinical research and education” was the “ideal location for [this] . . . technology.” On 31 August 2007, Raleigh Orthopaedic Clinic, P.A. (“plaintiff Raleigh Orthopaedic”), an orthopedic practice in Wake County, filed a petition requesting that the Council include in the 2008 Plan a need determination for six dedicated orthopedic ambulatory operating rooms in Wake County. After considering all petitions and making any necessary adjustments, the Council submitted the 2008 Plan to Governor Michael F. Easley (“Governor Easley”) on 7 November 2007. The adjustments requested by plaintiffs were not included in the 2008 Plan.

Plaintiff Raleigh Orthopaedic subsequently petitioned Governor Easley to adjust the 2008 Plan to reflect a need for six dedicated orthopedic ambulatory operating rooms in Wake County. On 18 December 2007, Governor Easley approved the 2008 plan, making it effective 1 January 2008. In this finalized plan, there was no need determination for a dedicated breast MRI scanner in Health Service Area I, and the need determination for orthopedic ambulatory operating rooms in Wake County was set at four.

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

Plaintiff Center subsequently requested the Department to issue a declaratory ruling that its acquisition of a linear accelerator, a dual use position emission tomography scanner, and a magnetic resonance imaging scanner did “not constitute a new institutional health service . . . and that [plaintiff Center was] not required to obtain a CON for the described transaction.” On 16 January 2008, Robert J. Fitzgerald, Director of the Department, denied plaintiff Center’s request, stating that “the proposed transaction . . . would be a violation of the CON law if consummated in the manner described.” On 8 February 2008, plaintiff Center sought judicial review of the Department’s ruling in the Superior Court of Wake County. The trial court affirmed the Department’s ruling on 26 June 2008.

Plaintiff Center and plaintiff Raleigh Orthopaedic (“plaintiffs”) filed a complaint, and subsequently an amended complaint, against defendants seeking a declaratory judgment that provisions of the Certificate of Need Law (“CON law”), as applied to plaintiffs, constitute an unconstitutional delegation of legislative authority, violate plaintiffs’ procedural and substantive due process rights, and deprive plaintiffs of meaningful access to the courts. Plaintiffs also sought monetary and injunctive relief. After defendants filed an answer denying plaintiffs’ constitutional claims and a motion to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure, all parties made cross motions for judgment on the pleadings.

While this litigation was still on-going, Orthopaedic Surgery Center of Raleigh, LLC, a related entity of plaintiff Raleigh Orthopaedic, applied for a Certificate of Need (“CON”) to construct a “freestanding ambulatory surgical facility with four surgical operating rooms in Wake County.” By letter dated 28 January 2009, the Department’s Certificate of Need Section granted Orthopaedic Surgery Center of Raleigh, LLC conditional approval to construct the requested facility.

On 26 March 2009, the trial court granted defendants’ motion for judgment on the pleadings while denying plaintiffs’ motion. In doing so, the trial court concluded that “[t]he SMFP, CON process and CON law, as applied, **do not violate** any of [p]laintiff[s]’ constitutional rights.” Plaintiffs appeal.

This Court reviews a denial of a motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

S.E.2d 263 (2005). In conducting such a review, we are “limited to the facts properly pleaded in the pleadings before [us], inferences reasonably to be drawn from such facts and matters of which [we] may take judicial notice.” *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 878-79 (1970).

[1] Plaintiffs first contend the trial court erred because the CON law, as applied, delegates legislative authority to the Council in violation of Article I, Section 6 and Article II, Section 1 of the North Carolina Constitution. We disagree.

We first note plaintiffs’ error in their assertion that the General Assembly has delegated legislative authority to the Council. The General Assembly has specifically recognized the role of the Council in *preparing* the Plan. *See* N.C. Gen. Stat. § 131E-176(25) (2009) (The Plan “means the plan prepared by the Department . . . and the . . . Council.”). However, as our Supreme Court noted in *Frye Regional Medical Center, Inc. v. Hunt*, 350 N.C. 39, 510 S.E.2d 159, *reh’g denied*, 350 N.C. 314, 534 S.E.2d 590 (1999), the Council’s role is strictly advisory. 350 N.C. at 44, 510 S.E.2d at 163. Instead, it is the Governor who “make[s] the final decision concerning the [Plan]’s contents after it has been developed and prepared by the Department and the Council.” *Id.* Although the Council formulates a proposed Plan each year, its need determinations are ultimately approved by the Governor, and it is the Governor’s role to “ensure that the [Plan] comports with the general health policies and goals of the state.” *Id.* at 43, 510 S.E.2d at 162. It is only after the Plan is approved by the Governor that the need determinations contained therein become determinative limitations on the ability of applicants to obtain CONs. *See* N.C. Gen. Stat. § 131E-183(a)(1) (2009) (“The proposed project shall be consistent with applicable policies and need determinations in the [Plan], the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.”). Despite plaintiffs’ error, we find the General Assembly’s delegation proper.

Article I, Section 6 of the North Carolina Constitution provides that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” N.C. Const. art. I, § 6. Article II, Section 1 of the North Carolina Constitution vests the legislative authority in the General Assembly. N.C. Const. art. II, § 1. Though these provisions, taken together, literally preclude “the legislature [from] abdicat[ing] its

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

power to make laws or delegat[ing] its *supreme* legislative power to any coordinate branch or to any agency which it may create[.]" courts have consistently recognized that "[a] modern legislature must be able to delegate—in proper instances—a *limited* portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the Legislature cannot deal directly." *Adams v. North Carolina Dep't of Natural & Econ. Res.*, 295 N.C. 683, 696-97, 249 S.E.2d 402, 410 (1978) (internal quotation marks omitted). This is because "the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers." *Id.* Thus, a delegation of legislative authority is proper "provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers." *Id.* at 697, 249 S.E.2d at 410. Moreover, "the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards." *Id.* at 698, 249 S.E.2d. at 411.

Our Supreme Court has stated that, "[i]n the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers." *Id.* at 698, 249 S.E.2d at 411. However, "[d]etailed standards are not required" *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 402, 269 S.E.2d 547, 563, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). Instead, "[t]he modern tendency is to be more liberal in permitting grants of discretion to administrative agencies" *Id.*; *see also Adams*, 295 N.C. at 698, 249 S.E.2d at 411 ("When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation."). Thus, "[i]t is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Id.*

The General Assembly has made clear the policies underlying the enactment of the CON law. Specifically, the General Assembly found:

- (1) That the financing of health care, particularly the reimbursement of health services rendered by health service facilities, lim-

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

its the effect of free market competition and government regulation is therefore necessary to control costs, utilization, and distribution of new health service facilities and the bed complements of these health service facilities.

(2) That the increasing cost of health care services offered through health service facilities threatens the health and welfare of the citizens of this State in that citizens need assurance of economical and readily available health care.

(3) That, if left to the market place to allocate health service facilities and health care services, geographical maldistribution of these facilities and services would occur and, further, less than equal access to all population groups, especially those that have traditionally been medically underserved, would result.

(3a) That access to health care services and health care facilities is critical to the welfare of rural North Carolinians, and to the continued viability of rural communities, and that the needs of rural North Carolinians should be considered in the certificate of need review process.

(4) That the proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care services.

....

(6) That excess capacity of health service facilities places an enormous economic burden on the public who pay for the construction and operation of these facilities as patients, health insurance subscribers, health plan contributors, and taxpayers.

(7) That the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria as determined by provisions of this Article or by the North Carolina Department of Health and Human Services pursuant to provisions of this Article prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served.

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

N.C. Gen. Stat. § 131E-175(1)-(4), (6)-(7) (2009). Additionally, the General Assembly has set forth detailed guidelines as to which services are encompassed by the CON law, and thus the Plan, as well as which services are exempt. N.C. Gen. Stat. §§ 131E-176(16), -178(a), -184 (2009). The Council and the Governor are guided by these principles and guidelines in their creation and approval of the Plan, and specifically the 2008 Plan. *See* N.C. Gen. Stat. § 131E-175(7) (stating that certain criteria—i.e. the Plan—from which new institutional health services will be evaluated are determined by the Department “pursuant to provisions of this Article”); *see also* *Frye*, 350 N.C. at 43, 510 S.E.2d at 162 (“[T]he Governor must, as a part of the approval process, ensure that the [Plan] comports with the general health policies and goals of the state.”). Due to the complexity involved in determining the evolving need for various health services and medical equipment in the State, we conclude these standards “are as specific as the circumstances permit,” and thus sufficient. *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 323 (1965); *see also* *Adams*, 295 N.C. at 699-700, 249 S.E.2d at 412 (noting that the General Assembly’s general list of goals for the coastal area management system constituted sufficiently specific guidelines in light of the expertise required to “develop[] and adopt[] detailed land use guidelines for the complex ecosystem of the coastal area”).

In addition to these guidelines, the General Assembly has also provided an adequate system of procedural safeguards. Before it is submitted to the Governor, the Plan is prepared each year by the Council and the Department. N.C. Gen. Stat. § 131E-176(25). During its creation, there are a total of at least seven required public hearings, one before and six after the Council adopts the Plan. *Id.* Fifteen days before a scheduled hearing, the Department must notify the people “who have requested notice of public hearings regarding the Plan.” *Id.* Additionally, the Council must accept both written and oral comments on the Plan before submitting it to the Governor for approval. *Id.* If these procedures are not followed, the Plan will be subject to the Administrative Procedure Act (“APA”), which “establishes a uniform system of administrative rule making and adjudicatory procedures for agencies.” N.C. Gen. Stat. § 150B-1(a) (2009); N.C. Gen. Stat. § 150B-2(8a)k (2009) (exempting the Plan from the definition of “rule” only “if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor”). These procedural safeguards are adequate to ensure that the Plan will be created “in a manner consistent with [the] leg-

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

islative intent.” *Adams*, 295 N.C. at 701, 249 S.E.2d at 412; *see also Town of Spruce Pine v. Avery Cty.*, 346 N.C. 787, 793, 488 S.E.2d. 144, 147-48 (1997) (finding the North Carolina Environmental Management Commission was subjected to sufficient procedural safeguards in creating rules and regulations where the agency was advised multiple times by a council comprised of representatives from various backgrounds before adopting the rule, was required to conduct multiple public hearings before adoption of the rule, and was required to submit reports to a legislative commission).

Plaintiffs, however, argue that there are no procedural safeguards in place because the Plan is exempt from the rule making procedures of the APA and the Council is exempt from the provisions of the State Government Ethics Act (“Ethics Act”). We believe the procedural safeguards established by N.C.G.S. § 131E-176(25) are sufficient, especially in light of the fact that these standards are similar to the ones for rule making required by the APA. *See* N.C. Gen. Stat. § 150B-21.2(a)(1)-(5) (2009) (requiring an agency to provide notice of a proposed rule, have a public hearing on a proposed rule, and accept oral or written comments on the proposed rule before the rule can be adopted). It is not required that the Plan must be subject to the same exact standards set forth in the APA in order to be constitutionally sufficient. Additionally, as stated above, the General Assembly has delegated the authority to ultimately finalize the Plan to the Governor, who is in fact subject to the Ethics Act. N.C. Gen. Stat. § 138A-3(30)a (2009) (defining public servants as “[c]onstitutional officers of the State and individuals elected or appointed as constitutional officers of the State prior to taking office”); N.C. Gen. Stat. 138A-3(10) (2009) (defining a “covered person” under the Ethics Act as “[a] legislator, public servant, or judicial officer, as identified by the Commission under G.S. 138A-11”). Moreover, we do not see how exclusion of the Council from the Ethics Act, which was created years after the CON law was enacted, constitutionally invalidates the Plan. *See* 2006 N.C. Sess. Laws 747, 799, ch. 201, § 25 (making the Ethics Act effective 1 October 2006); *see also* 1977 N.C. Sess. Laws (2d Sess.1978) 71, 84, ch. 1182, § 4 (making Article 18 of Chapter 131 of the North Carolina General Statutes effective 1 January 1979). Accordingly, because the General Assembly has set forth sufficient guiding standards and procedural safeguards to follow in creating the Plan, we find its delegation of this legislative authority proper.

Plaintiffs, in urging a different result, finally suggest that the General Assembly’s delegation of authority to the Council to create

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

the Plan is a facially invalid delegation to private individuals. Specifically, plaintiffs suggest that “[t]he affiliation of members of the Council with existing healthcare providers, and the Council’s exemption from the protections contained in the Ethics Act, make any need determinations made by the Council inherently subject to abuse.” Again, we reiterate that the Council serves in merely an advisory capacity to the Governor, in whom is reposed the final decision as to the contents of the Plan. Additionally, the affiliation of some of the Council members with existing medical facilities throughout the state automatically is not a sufficient interest to render their decisions subject to abuse. See *City of Albemarle v. Sec. Bank & Tr. Co.*, 106 N.C. App. 75, 77-79, 415 S.E.2d 96, 98-99 (1992) (affirming the trial court’s finding that “the interest of the respective council members[, who were executives in financial institutions in direct competition with the defendant,] . . . was too remote and infinitesimal to give rise to a conflict of interest” (internal quotation marks omitted)). Thus, the General Assembly has not unconstitutionally delegated its legislative authority.

[2] Plaintiffs next argue that their rights to due process of law, guaranteed by Article I, Section 1 and Section 19 of the North Carolina Constitution, are denied by the CON law. Specifically, they argue that because the CON law requires “a provider to obtain a CON before developing a new institutional health service” while also imposing “a Plan that ensures that the provider’s CON application will be rejected,” they are denied the right to engage in business without due process of law.

Plaintiffs first appear to suggest that the CON law violates their procedural due process rights. However, they have provided no legal authority or argument in support of this contention, and we therefore decline to consider it. N.C.R. App. P. 28(b)(6) (amended Oct. 1, 2009) (deeming abandoned any assignments of error for which “no reason or argument is stated or authority cited”).

Plaintiffs’ substantive due process argument rests on the constitutional guarantees set forth in Article I, Section 1 and Section 19 of the North Carolina Constitution. Article I, Section 1 establishes that all persons are afforded the “inalienable rights [of] . . . life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.” N.C. Const. art. I, § 1. Article I, Section 19 provides, “[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land.” N.C. Const. art. I, § 19. “The law of the land, like due process of law, serves to limit the state’s police power to actions

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

which have a real or substantial relation to the public health, morals, order, safety or general welfare.” *Poor Richard's Inc., v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988) (internal quotation marks omitted). “These constitutional protections have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose.” *Id.* Since obtaining a dedicated breast MRI scanner and constructing six dedicated orthopedic ambulatory operating rooms are economic enterprises, we must determine (1) whether there exists a legitimate governmental purpose for the creation of the CON law and (2) whether the means undertaken in the CON law are reasonable in relation to this purpose. *Id.*; see also *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 536-37, 571 S.E.2d 52, 59-60 (2002) (reiterating that “economic rules and regulations do not affect a fundamental right for purposes of due process” and thus only require a rational relation standard instead of a strict scrutiny analysis); see also *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973) (applying a reasonable relation standard in determining whether the previous CON law violated the plaintiff's substantive due process rights where the plaintiff was denied a CON to build a hospital). In making this determination, it has been said “that the relationship need not be a perfect one, but that the legislature need only have had a reasonable basis for concluding that the measures taken would assist in the accomplishment of the goal.” *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 682, 446 S.E.2d 332, 346 (1994).

The ultimate purpose in enacting the CON law was to protect the health and welfare of North Carolina citizens by providing affordable access to necessary health care. N.C. Gen. Stat. § 131E-175(7) (“[T]he general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria.”). This purpose is a legitimate one. See *Affordable Care, Inc.*, 153 N.C. App. at 537, 571 S.E.2d at 60 (finding that “the Rule's purpose . . . to protect the public health and welfare with respect to the practice of dentistry” was a legitimate governmental purpose).

In order to achieve this goal, the General Assembly set forth requirements that must be met before a new institutional health serv-

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

ice can be offered or developed. N.C. Gen. Stat. § 131E-183(a). One such requirement is that the new institutional health service comply with the need determinations established in the Plan. N.C. Gen. Stat. § 131E-183(a)(1). The General Assembly determined that this “need” requirement was necessary before allowing a new institutional health service to be created because (1) the effects of free market competition are limited in the field of health care, requiring governmental regulation “to control costs, utilization, and distribution of new health service facilities[;]” (2) citizens’s health and welfare is enhanced by “assurance of economical and readily available health care[,]” which is threatened by increasing costs in the health care field; (3) “geographical maldistribution” of health care services and facilities, and thus unequal access to health care, would occur if the allocation of these services was left to the market place; (4) access to health care is critical to the welfare of North Carolina citizens; and (5) the creation of “unnecessary health service facilities results in costly duplication and underuse of facilities,” which “places an enormous economic burden on the public.” N.C. Gen. Stat. 131E-175(1)-(4), (6)-(7). Thus, the General Assembly determined that approving the creation or use of new institutional health care services based in part on the need of such service was necessary in order to ensure that all citizens throughout the State had equal access to health care services at a reasonable price, a situation that would not occur if such regulation were not in place.

The process by which the General Assembly chose to make need determinations was through the annual development of the Plan. The Plan is created each year under the guidance of the Council. The members of the Council, which include members from academic medical centers, health education centers, the health industry, the health insurance industry, various State health care associations, the North Carolina Medical Society, the North Carolina Association of County Commissioners, the United States Department of Veterans Affairs, the North Carolina House of Representatives, and the North Carolina Senate, are appointed by the Governor. Through the use of detailed methodologies, the Council determines the need for each institutional health service in each designated area. In developing the Plan, the Council conducts public hearings and accepts oral and written comments on its contents. *See* N.C. Gen. Stat. § 131E-176(25). Once the Council has completed its recommended Plan, the Governor approves the final version after making any substantive changes deemed appropriate. *See id.* At this point, the need determinations

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

set forth in the Plan are utilized by the Department in evaluating CON applications. N.C. Gen. Stat. § 131E-183(a)(1).

The General Assembly's desire to ensure that citizens have affordable access to necessary health care is a legitimate goal, and it is a reasonable belief that this goal would be achieved by allowing approval of new institutional health services only when a need for such services had been determined. *See Armstrong v. N.C. State Bd. of Dental Exam'rs*, 129 N.C. App. 153, 161-62, 499 S.E.2d 462, 469 (finding the statute rationally related to a legitimate purpose where "the legislature could have reasonably believed that the statute would promote these ends"), *appeal dismissed, disc. review denied, disc. review dismissed as moot*, 348 N.C. 692, 511 S.E.2d 643 (1998), *cert. denied*, 525 U.S. 1103, 142 L. Ed. 2d 770 (1999). The current CON law was enacted pursuant to the National Health Planning and Resource Development Act of 1974 ("National Health Act"), which required "states to establish certificate of need programs as a prerequisite to obtaining federal health program financial grants." *Total Renal Care of North Carolina LLC v. N.C. Dep't of Health & Human Servs.*, — N.C. App. —, —, 673 S.E.2d 137, 139 (2009). The National Health Act was passed in order to address the concern of the United States Congress "that the many *unneeded* hospital beds available in the nation imposed an unnecessarily exorbitant financial burden on the furnishing of required health care, and that there was an uneven distribution of health care facilities, resulting in some areas being over supplied and others being woefully deficient." *State of North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532, 534 (1977), *aff'd*, 435 U.S. 962, 56 L. Ed. 2d 54 (1978) (emphasis added). Thus, following Congress's logic, the General Assembly acted reasonably in concluding that citizens would have equal access to health care in facilities that did not economically overburden the public if new institutional health services were allowed only in areas where they were clearly needed. *See id.*; *see also Total Renal Care of North Carolina LLC*, — N.C. App. at —, 673 S.E.2d at 139 ("The fundamental purpose of the CON Law is to limit the construction of health care facilities in North Carolina to those that are needed by the public and that can be operated efficiently and economically for the public's benefit.").

Moreover, utilization of the Plan to determine which institutional health services are needed is appropriate. The Council, which is comprised of individuals knowledgeable in the provision of health care services, makes the need determinations on an annual basis, ensuring

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

that the need determinations are accurate and up-to-date. *See* N.C. Gen. Stat. § 131E-176(25). Citizens, including plaintiffs, are afforded the opportunity to provide input with respect to the necessity of various health care services in the formation of the annual Plan. *Id.* Once the Plan is adopted, the Department, which is afforded limited time to evaluate CON applications, is provided with the Plan's need determinations for utilization in its review instead of having to research such determinations on its own. *See* N.C. Gen. Stat. § 131E-185(a1) (2009) (providing "a time limit of 90 days for review of [CON] applications"); *see also* N.C. Gen. Stat. § 131E-183(a)(1) (establishing that the first criteria which the Department is to use in evaluating CON applications is their compliance with the need determinations provided in the Plan). This procedure is efficient and effective and we do not believe, as plaintiffs suggest, that a case by case determination of need, beyond that determined by the Plan, is required to provide an applicant with due process. Because the CON law, and the need determination process contained therein, are reasonably related to the General Assembly's goal of protecting the public welfare by ensuring that all citizens have access to reasonably affordable health care, we find plaintiffs' due process rights are not violated.

Relying on *In re Certificate of Need for Aston Park Hospital, Inc.*, *supra*, plaintiffs urge a different result. In that case, our Supreme Court invalidated the predecessor to the current CON law on the basis that it violated the plaintiff's substantive due process rights. *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735. The prior law prohibited the issuance of a certificate of need unless it was "necessary to provide new or additional inpatient facilities in the area to be served." *Id.* at 545, 193 S.E.2d at 732 (internal quotation marks omitted). However, there were limited findings made by the General Assembly as to how this requirement promoted the public welfare. *See id.* at 544, 193 S.E.2d at 731 (noting that the previous CON law simply required the licensing agencies to "make a 'determination of need' " before issuing a license to provide new health facilities in order to "encourage the necessary and adequate development of health and medical care facilities . . . in a manner which is orderly, timely, economical, and without unnecessary duplication of these facilities"). Thus, the Court held that no "reasonable relation between the denial of the right of a person, association or corporation to construct and operate upon his or its own property, with his or its own funds, an adequately staffed and equipped hospital and the promotion of the public health" existed. *Id.* at 551, 193 S.E.2d at 735. In doing so, the Court stressed that there was no evidence to suggest market

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

forces and competition would not “lower prices, [and create] better service and more efficient management” in the health services arena. *Id.* at 549, 193 S.E.2d at 734.

The current CON law is distinguishable from the one invalidated in *Aston Park*. Most significantly, the current law contains detailed explanations as to how the requirement of a CON based on need determinations promotes the public welfare. *See* N.C. Gen. Stat. § 131E-175(1)-(4), (6)-(7). Within these findings, the General Assembly has specifically emphasized that “if left to the market place to allocate health service facilities and health care services, geographical maldistribution of these facilities and services would occur.” N.C. Gen. Stat. § 131E-175(3). Thus, the deficiencies identified by the Court in *Aston Park* are no longer present in the current CON law. *See HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep’t of Human Res.*, 327 N.C. 573, 584, 398 S.E.2d 466, 473 (Whichard, J., dissenting on other grounds) (“Since *Aston Park*, the General Assembly has re-enacted the CON law and made the explicit findings discussed above which describe the relation between the purposes behind the CON law and the effect it has on individual property rights. Thus, the constitutional infirmity identified in *Aston Park* is not at issue here.”). Therefore, as this Court has already noted, the holding in *Aston Park* is moot, and plaintiffs’ reliance thereon is misplaced. *State ex rel. Utils. Comm’n v. Empire Power Co.*, 112 N.C. App. 265, 275, 435 S.E.2d 553, 558 (1993), *disc. review denied*, 335 N.C. 564, 441 S.E.2d 125 (1994).

[3] Finally, plaintiffs attempt to argue that the CON Law, in connection with the Administrative Procedures Act, N.C.G.S. § 150B-34(c) (“APA”), and the North Carolina Administrative Code provision 10A N.C.A.C. 14C.0402, deny their right of access to the courts in violation of Article I, Section 18 of the North Carolina Constitution. However, plaintiffs have not established that they have standing to bring this challenge. “Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter.” *Prop. Rights Advocacy Grp. v. Town of Long Beach*, 173 N.C. App. 180, 182, 617 S.E.2d 715, 717 (internal quotation marks omitted), *as to additional issues appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 649 (2005), *aff’d per curiam*, 360 N.C. 474, 628 S.E.2d 768 (2006). “Standing to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law’s enforcement.” *Maines v. City of*

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

Greensboro, 300 N.C. 126, 130-31, 265 S.E.2d 155, 158 (1980). Similarly, when a party challenges a statute's constitutionality on an as applied basis, they must allege facts as to "how a statute was applied in the particular context in which plaintiff acted or proposed to act." *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999).

Citing only Article I, Section 18 of the North Carolina Constitution, plaintiffs allege that "[t]he CON Law, the APA, and the provisions of 10A N.C.A.C. 14C.0402, as applied in this case, combine to deprive [them] of access to the courts for redress of grievances" In support of this argument, plaintiffs contend that the exemption of CON decisions from certain provisions of the APA, which provide for review of agency decisions, denies them "effective judicial review of CON decisions." However, as plaintiffs acknowledge, "[a]fter a decision of the Department to issue, deny or withdraw a certificate of need . . . any affected person . . . shall be entitled to a contested case hearing." N.C. Gen. Stat. § 131E-188(a) (2009). Thus, it appears that plaintiffs are essentially arguing that the procedures which the General Assembly has provided for review of CON decisions are inadequate.

However, plaintiffs have not alleged, and there is no evidence in the record to show, that they actually sought relief or intended to seek relief under the review procedures they challenge. The record indicates that plaintiff Raleigh Orthopaedic did in fact submit an application for a CON requesting permission to construct a "free-standing ambulatory surgical facility with four surgical operating rooms" instead of the six operating rooms it desired. There is no evidence that plaintiff Center applied for a CON. Moreover, there is no evidence that either plaintiff was subsequently denied a requested CON or filed a petition for a contested case hearing. Thus, plaintiffs have not shown how these statutes were "applied in the particular context in which plaintiff[s] acted or proposed to act." *Frye*, 109 F. Supp. 2d at 439. Because of this, plaintiffs have not established standing to challenge these statutes. See *In re Perkins*, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983) (finding the respondent had no standing to challenge the constitutionality of the statutes when he had failed "to show that he ha[d] been adversely affected by the . . . statutes as applied").

Assuming plaintiffs had standing to challenge the constitutionality of these provisions, their claim that they have been denied access to the courts is without merit. Currently, any party who is denied a CON is entitled to a contested case hearing where an administrative

HOPE—A WOMEN'S CANCER CTR., P.A. v. STATE OF N.C.

[203 N.C. App. 593 (2010)]

law judge reviews the CON decision and issues a recommended decision containing findings of fact and conclusions of law. N.C. Gen. Stat. § 131E-188(a); N.C. Gen. Stat. § 150B-34(c) (2009). The Department then reviews the administrative law judge's decision, addressing all facts contained therein. N.C. Gen. Stat. § 150B-34(c). If the Department declines to adopt a finding made by the administrative law judge, it must state its specific reasons. *Id.* The Department then makes a final decision based on its findings of fact, which must be supported by substantial evidence. *Id.* Any party dissatisfied with the Department's final decision is entitled to appeal the decision to this Court. N.C. Gen. Stat. § 131E-188(b) (2009).

However, plaintiffs contend that a meaningful review is only possible if CON decisions are subject to certain provisions of the APA. Because the General Assembly has specifically exempted review of CON decisions from these provisions, plaintiffs attempt to argue their constitutional rights of access to the courts have been violated. *See* N.C. Gen. Stat. § 150B-34(c) ("The provisions of G.S. 150B-36(b), (b1), (b2), (b3), and (d), and G.S. 150B-51 do not apply to cases" "arising under Article 9 of Chapter 131E of the General Statutes."). Moreover, plaintiffs suggest, without providing any argument or legal support, that because "[t]he correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing[.]" N.C. Admin. Code tit. 10A, r. 14C.0402 (June 2008), they are prevented from effectively challenging the "determinative issue in a contested case."

The North Carolina Constitution guarantees an aggrieved party access to the courts in order to obtain a remedy. N.C. Const. art. I, § 18. However, "the remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983). Thus, this Court has held that "[t]here is no constitutional or inalienable right of appellate or judicial review of an administrative decision," and "[t]here can be no appeal from [such] decision . . . except pursuant to [a] specific statutory provision" *In re Vandiford*, 56 N.C. App. 224, 227, 287 S.E.2d 912, 914 (1982). Since a CON decision is an administrative decision, plaintiffs are not constitutionally entitled to any judicial review or appeal. The General Assembly has set forth the process for review of CON decisions which it deems appropriate. This is the only process to which plaintiffs are entitled; they are not, as they suggest, entitled to the

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

judicial review of their choice. Accordingly, plaintiffs' constitutional right of access to the courts has not been violated.

Affirmed.

Judges STEPHENS and ERVIN concur.

STATE OF NORTH CAROLINA v. DEMONTRE ANTHONY SAMUEL

No. COA09-1230

(Filed 4 May 2010)

Evidence— guns—plain error to admit—relevancy

The trial court committed plain error in a double robbery with a dangerous weapon and assault with a deadly weapon case by admitting evidence of guns found in defendant's home. The guns were not relevant to the crimes charged because the victims' description of the gun used in the attack did not match either of the guns found in the closet, and neither witness identified either gun as the one used in the robbery.

Appeal by Defendant from judgments entered 2 October 2008 by Judge Henry W. Hight in Durham County Superior Court. Heard in the Court of Appeals 22 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Michele Goldman for Defendant.

STEPHENS, Judge.

I. Procedural History

On 21 April 2008, Defendant Demontre Anthony Samuel was indicted on two counts of robbery with a dangerous weapon and one count of assault with a deadly weapon. Defendant declined the State's plea offer "to consolidate all the charges for the mitigated range for robbery with a dangerous weapon[.]" and the State withdrew the offer on 4 August 2008.

The matter was tried before a jury during the 29 September 2008 criminal session of Durham County Superior Court. The jury found

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

Defendant guilty on both counts of robbery with a dangerous weapon and the lesser included offense of simple assault. The trial court entered judgment upon the jury verdicts, sentencing Defendant to a prison term of 60 to 81 months for the first robbery conviction and the simple assault conviction and a consecutive prison term of 60 to 81 months for the second robbery conviction.¹ Defendant gave notice of appeal in open court.

II. Evidence

At trial, the evidence tended to show the following: On 23 February 2008, Larry Johnson (“Larry”) and his cousin Archie Poteat (“Archie”) left the Northgate Mall in Durham, North Carolina and went to the bus stop. In a written statement given to police after the incident at issue, Larry stated:

We were waiting for the bus and this guy walked up on me[,] pulled out a gun and said give me your chain[.] I said no and he hit me in the head with the gun, and took the chain off my neck. [H]e then pointed the gun at my cousin and took his [chain]. [H]e then walked back to where he was with his friends and me and my cousin walked to the store and called my mother. She called the police and we described to them what he looked like. I told them he was a heavy set guy, dark skin, short hair, he had on a black shirt, blue jeans. The gun was a smokey [sic] grey gun[.] I think it was a 9 [millimeter] pistol because it was a kinda big pistol.

Archie testified to the same sequence of events that Larry described in his written statement. Archie could not describe in detail what the assailant looked like, although Archie estimated that the assailant was about six feet tall and noticed that “[h]e was built. He wasn’t fat. He was just built.” Archie testified that the assailant was wearing “a black shirt, blue jeans, and black sneakers.”

Larry testified at trial that one of his friends, Lynnette Paul (“Lynnette”), called him the day after the incident and told him that Defendant was the one who had robbed him. Larry told his mother about Lynnette’s call. He also called Detective Richard Clayton (“Clayton”) of the Durham City Police Department and reported what Lynnette had said.

1. Although the trial court announced in open court that Defendant was sentenced to 30 days in prison for the simple assault conviction, and that such sentence was to run consecutively with the 60 to 81 month sentence for the first robbery conviction and the simple assault conviction shows only one sentence of 60 to 81 months for both convictions.

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

Based on the information given to Larry by Lynnette, Clayton called Larry down to the station so that Larry “could identify who did it[.]” Larry went to the police station with his sister, who went to school with Lynnette at the time, and his mother. Clayton asked Larry if he could identify who had committed the crimes against Larry and Archie, and Larry indicated that he could. Detective J.R. Salmon (“Salmon”) of the Durham City Police Department showed Larry a six-person photo array, one picture at a time. When Larry went through the array the first time, he did not pick out a photograph. According to Salmon, however, Larry hesitated when he looked at the fifth photograph. Salmon showed the photo array to Larry a second time. Although Larry did not pick out a photograph, according to Salmon, “[w]hen we got to photo number five, he looked at the picture for approximately 20 seconds, and he made a face and said, no, that’s not him.” Salmon further testified, “Then I went out and spoke with Investigator Clayton because I felt that the victim was nervous and recognized the gentleman, but was not willing to testify or give that information.” Clayton “decided it would be best to get [Larry’s mother] involved for moral support[.]” so Clayton and Larry’s mother went into the room and talked with Larry for about five minutes. Then Clayton “came back out of the room and asked [Salmon] to go back in and show [Larry] the photo array one more time.” This time, “[a]t photo number five, [Larry] picked [Defendant] out and pointed to him and said, [‘]yeah, that’s him.[’]” Salmon left the interview room after Larry’s identification of Defendant and went to Clayton’s office. Clayton testified, “I closed the door. I remember a smile on [Salmon’s] face. He said, [‘]he pointed out number five.[’] At that time, I knew number five was [Defendant].”

Based on Larry’s identification of Defendant in the photo array, Clayton applied for, and was granted, a warrant to search Defendant’s residence. On 29 February 2008, Clayton, Salmon and other Durham City police officers went to Defendant’s home to execute the search warrant. Defendant was arrested and taken to the police station. Meanwhile, the officers read Defendant’s stepfather, David Bracey, the search warrant and interviewed him. Bracey informed Clayton that there were guns upstairs in his bedroom closet. Upstairs in Bracey’s closet, Clayton found “a silver—it was a shiny[,] silver semi-automatic, which was [Bracey’s] gun that was locked in a safe. Then there was a small silver revolver that was located inside the closet also but not in the safe.” Clayton collected the guns as evidence. Clayton testified that the main thing he was looking for, “aside from the weapons, were the chains, direct evidence from the crime or the

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

robbery that I was unable to locate. So I knew I kind of had to move on with my investigation with that.”

After completing the search of Defendant’s home, Clayton went to the police station to interview Defendant. Defendant told Clayton that he had been at the mall on 23 February 2008 and had taken pictures with his girlfriend at a photo store in the mall. When he left the mall in the evening, he waited at the bus stop with his brother, Teshawn Johnson (“Teshawn”), his cousin, Shaquille Drakeford (“Shaquille”), and his girlfriend, Lashay Davis (“Lashay”). Defendant told Clayton that he was wearing a black jacket, black t-shirt, black jeans, and black shoes with a yellow and white design on them.

Clayton instructed Salmon to retrieve from the mall the photographs Defendant took with his girlfriend. Salmon went to the mall and located the store where the photographs were taken. Although there were several photographs, Salmon took only one of them. Salmon testified that in the photograph, Defendant was wearing a “black shirt with either [a] yellow or white stripe across the top where the undershirt was.” Even though the owners of the store cropped Defendant’s girlfriend out of the photograph, the shoulder of another individual, wearing white and yellow stripes, appeared in the photograph to Defendant’s right.

Clayton returned to Defendant’s house the evening of 29 February 2008 “to verify that [Defendant’s] brother Teshuan and his cousin Shaquille [had been] at the bus stop.” While at Defendant’s house, Clayton did not attempt to collect the clothing Defendant claimed to have been wearing on the night of the robberies. Clayton did, however, interview Teshuan. During the interview, Teshuan gave Clayton one of the chains that had been taken during the robberies. Teshuan gave Clayton a statement indicating where he got the necklace. Based on Teshuan’s statement, Clayton set up an interview with Marcus Jackson (“Marcus”).

On 3 March 2008, Clayton spoke with Shaquille. Shaquille told Clayton that he had been with Defendant, Teshuan, D’Andre,² Preston Scurlock, and Tyrone Peace at the Northgate Mall on 23 February 2008. When the group left the mall, they went to the bus stop to catch the bus home. Shaquille saw Larry and Archie “crossing the street coming towards the bus stop, going behind the bus stop to the wall.” While they were waiting at the bus stop, Defendant was seated between D’Andre and Preston under the shed. Shaquille testified, “I

2. D’Andre’s last name is not included in the record.

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

seen Marcus come out from behind with two chains. So I asked him if I could have one, and he gave me one.” Shaquille testified that Defendant “was still sitting down” when Marcus walked up with the chains. After handing Shaquille the chain, Marcus and his cousin got in Marcus’s mother’s car and left. Shaquille put the chain around his neck. When the bus pulled up, Shaquille, Defendant, and the rest of their group got on. After he got home, Shaquille “seen that the chain was fake” so he gave it to his youngest cousin, Tyreen.

On cross-examination, Shaquille testified that on the night of the robberies, Defendant was wearing a black t-shirt with a yellow shirt under it, black jeans with a big white design outlined in yellow on the back, and black shoes with yellow and white on them. He identified defense exhibits 2, 3A, and 3B as the pants and shoes Defendant wore on the night of 23 February 2008.

On 14 March 2008, Clayton went to Marcus’s house, which is located directly across the street from Defendant’s house, and received permission from Marcus’s mother to search Marcus’s room. Clayton did not locate any evidence associated with the crimes at issue in Marcus’s room. Later that day, Clayton met with Marcus at the police station. At that interview, Marcus told Clayton that he had a chain from the robberies at his house but that he had given it to his father. Marcus’s father, who had accompanied Marcus to the police station, did not have the chain with him at the interview. Marcus’s father left the police station, retrieved the chain from his home, and brought it back to Clayton. The chain had a diamond-studded cross on it and was the chain that had been stolen from Larry.

At trial, Marcus, a six-foot, two-inch, 240-pound, right tackle for his high school football team, acknowledged that he had been at the Northgate Mall bus stop with his cousin on the night of 23 February 2008. Marcus testified that he saw Defendant sitting “[u]nder the shed thing” at the bus stop that evening with about four other people. Marcus further testified that he “really didn’t see nothing, actually. I really didn’t see nothing.” Marcus admitted that several days after the incident, he gave a written statement to police regarding the incident. The trial court sustained Defendant’s objection to the prosecutor’s attempt to admit Marcus’s written statement for the truth of the matter asserted therein. After excusing the jury, the trial court allowed the prosecutor to *voir dire* Marcus to determine if the written statement could be admitted to corroborate his in-court testimony. After the *voir dire*, the trial court ruled that Marcus “can’t testify to the

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

content of the statement, except as to if the [D]efendant gave him the chain. He can testify that that's consistent."

When the jury returned, the prosecutor resumed her examination of Marcus. Marcus testified that he and his cousin weren't at the bus stop longer than five minutes on the night of 23 February 2008 and that his mother came and picked them up. The following exchange then took place:

[Prosecutor:] What did you have in your possession when you left that bus stop?

[Marcus:] Nothing.

[Prosecutor:] Nothing? What, if anything, did [Defendant] give you?

....

[Marcus:] Nothing.

....

[Prosecutor:] He never gave you anything?

[Marcus:] The same night?

[Prosecutor:] Yes.

[Marcus:] No.

[Prosecutor:] What did he give you when?

....

[Marcus:] When what?

....

[Prosecutor:] Did he give you anything? You know him so well. Did he give you anything during the course of you knowing him?

....

[Marcus:] No.

....

[Prosecutor:] He didn't give you anything?

[Marcus:] No, not to my knowledge.

[Prosecutor:] He never gave you a chain?

....

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

[Marcus:] No.

[Prosecutor:] He never gave you a chain?

[Marcus:] I got the chain from another boy when we was like at the corner of my neighborhood.

[Prosecutor:] From whom did you get the chain?

[Marcus:] I don't even remember. . . .

After a brief bench conference, the jury was recessed for lunch. The prosecutor asked that the record reflect that Marcus made several statements during *voir dire* and "then turned around and made inconsistent statements on the record when we came back in with the jury."

Immediately after the lunch recess, the jury was excused again. The trial court warned Marcus, "You've made an inconsistent statement under oath in this courtroom under oath. I just want to advise you [of] the penalties of perjury . . . I think it's a Class F. . . [T]he maximum sentence you could receive for a Class F felony would be 20 months."

When the jury returned to the courtroom, the prosecutor asked Marcus, "Did you receive a necklace?" Marcus responded, "Yes." When asked from whom he received it, Marcus replied that he received it from Defendant.

After Marcus left the witness stand, the State recalled Larry, who had identified Defendant both in the photographic line-up and in court as the assailant. Larry testified that he had never seen Marcus before and that Marcus was not his assailant.

Lynnette testified that she told Clayton she had witnessed the robberies. However, Lynnette admitted at trial that she did not witness the robberies and she was not, in fact, at the bus stop with Larry and Archie on the night they were robbed. Instead, she "was at a different bus stop . . . on the other side of the mall." The prosecutor asked Lynnette, "What do you recall happening on [23 February 2008] at that bus stop?" Lynnette responded, "I don't—all I know, they was at a different bus stop." Lynnette further testified that she heard about the robbery when she got a phone call from Larry. Larry told Lynnette that his assailant was wearing a black shirt, blue jeans, and black sneakers. Lynnette did not recall Larry describing any physical characteristics of his assailant. The prosecutor then asked, "When Larry described the person who robbed him, what, if anything, did

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

you say to Larry?” Lynnette replied, “I said [Defendant’s] name.” Lynnette testified that she and Defendant went to school together and that she had seen him at the mall that evening wearing a “[b]lack shirt, blue jeans, and black sneakers.” She also testified that she got on the “number one” bus and then, after a while, Defendant got on the bus with “the people he was with.” Lynnette recalled that Defendant was wearing a “[b]lack [t]-shirt, blue pants, and black sneakers” when he got on the bus. She did not remember any stripes, markings, or other colors on Defendant’s clothes. Lynnette further testified that she saw Larry’s chain in Defendant’s hand. Although both Shaquille and Marcus testified that Marcus was picked up at the bus stop by his mother on the night of the robberies, Lynnette testified that Marcus was also on the bus.

Defendant called his mother, Khadedre Drakeford, to testify on his behalf. Ms. Drakeford recognized Defendant’s Exhibits Numbers 2 and 3 as the clothes Defendant wore to the mall on the evening of 23 February 2008. She testified that she bought the clothes with Defendant in Raleigh on the afternoon of 23 February because Defendant was going to the mall to take pictures with his girlfriend, “and they wanted to match.” Ms. Drakeford drove Defendant to the Northgate Mall that evening, and “[h]e caught the bus back.” Ms. Drakeford was awake when Defendant came home from the mall, and she testified that he was wearing the same clothes they had purchased that day and that he wore to the mall that evening, “[b]lack [t]-shirt, yellow [t]-shirt up under it, those black jeans with the white stripe down the back, [and] yellow and black sneakers.”

On cross-examination, Ms. Drakeford acknowledged that she had spoken to Clayton about the revolver found in Bracey’s bedroom closet. Over objection, she testified that she informed Clayton that she found the revolver on 25 February 2008 in an upstairs bedroom on a top bunk. When Ms. Drakeford asked Defendant if the revolver was his, he told her it was not. Over further objection, Ms. Drakeford testified that she “took the gun and put it in the closet to take it to an officer that lives down the street from me.” Ms. Drakeford testified, again over objection, that she had never known Defendant to carry a gun. The prosecutor then asked, “So two days after [the incident at issue], you found a weapon in the bedroom and you talked to [Defendant] about it?” Ms. Drakeford replied, “Yes, I did.” When asked who Defendant said the gun belonged to, over objection, Ms. Drakeford testified that Defendant “said the young man’s name was Michael. I am familiar with that young man. His last name is Fuller.”

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

The prosecutor then asked, “So [Defendant] hangs around guys with guns?” Ms. Drakeford responded, “No.” Defendant’s objection was again overruled.

III. Discussion

Defendant first argues that the trial court erred in admitting evidence of the guns found in Defendant’s home as the guns were not relevant to the crimes charged. We agree.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2007). “Evidence which is not relevant is not admissible.” N.C. Gen. Stat. § 8C-1, Rule 402 (2007). Although “a trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.” *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

Where a defendant has made a timely objection at trial, “[t]he admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown[.]” *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987). “A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443(a) (2007). Where a defendant has failed to make a timely objection at trial, the admission of evidence which is technically inadmissible will be treated as harmless unless plain error is shown. Plain error occurs when an error “‘had a probable impact on the jury’s finding that the defendant was guilty.’” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (footnote omitted)).

In his pre-trial statement to police, Larry described the gun used in the attack against him as “a smokey [sic] grey gun[. I] think it was a 9 [millimeter] pistol because it was a kinda big pistol.” At trial, Larry testified regarding the gun as follows:

[Larry:] It was a pretty big gun. It was a smokey [sic] gray color.

[Prosecutor:] Smokey [sic] gray?

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

[Larry:] Yes.

[Prosecutor:] Are you familiar with weapons?

[Larry:] A little bit.

[Prosecutor:] Can you distinguish between a revolver and a semi-automatic?

[Larry:] Yes.

[Prosecutor:] Which type of weapon was pointed at you?

[Larry:] A semi-automatic.

Archie testified regarding the gun used in the attack as follows: “It was a long gun. A smokey [sic]—it was smokey [sic] gray, pointed at me.”

Clayton testified that he found “a silver—it was a shiny[,] silver semi-automatic, which was [Bracey’s] gun that was locked in a safe. Then there was a small silver revolver that was located inside the closet also but not in the safe.”

Clayton testified further:

I made a determination, due to my prior interviews with both victims, I asked them to describe the weapons, the gun that was displayed. Both victims, Larry and Archie, indicated that it was a silver, like a smokey [sic] gray, large semi-automatic handgun.

I ensured that they knew the difference between a revolver and a semi-automatic. Both victims indicated it was a semi-automatic.

The weapon that I recovered at [Defendant’s] residence, aside from the semi-automatic [sic], was a silver shiny semi-automatic that was owned by his stepfather. Aside from that, another weapon which was a small, gray revolver was located. So I made the determination that that was not the weapon that was used in the robbery.

Salmon identified State’s Exhibit Number 16, the revolver, as “one of the two guns that was taken out of the residence out of the stepfather’s room[.]”³ Salmon identified State’s Exhibit Number 17, the

3. On appeal, the State mistakenly asserts that it

presented evidence that three, not two, handguns were found, two of which were semi-automatic weapons, as was the weapon used to rob the victims. Only one gun, a revolver, was identified by a witness as probably not being the weapon used in the robbery.

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

semi-automatic, as “the second handgun that was recovered in the house.” On cross-examination, Salmon testified that the second gun was found upstairs in a locked safe.

Officer Catherine M. Lipsey of the Durham Police Department photographed the guns and placed them in brown paper bags. Lipsey identified State’s Exhibit Number 22 as “a photograph I took of the weapon.”⁴ Over objection, Lipsey identified State’s Exhibit Number 16 as “the handgun that I took out of the closet on the top shelf.” The exhibit was admitted into evidence, over objection. Lipsey identified State’s Exhibit Number 17 as “the gun that . . . I took out of the safe.” Over objection, the exhibit was admitted into evidence.

On cross-examination, Lipsey explained that she did not collect “any kind of tissue or blood” from either gun and that if there had been any, she “would have collected it, or . . . taken the handgun and driven it down to the SBI labs” for testing. Clayton testified that only the revolver was swabbed for DNA and that no fingerprints were taken from the revolver.

On cross-examination, over Defendant’s repeated objection to the relevance of the line of questioning, the prosecutor questioned Ms. Drakeford about the revolver. Ms. Drakeford testified that she found the revolver on 25 February 2008 in an upstairs bedroom on a top bunk and talked to Defendant about it. The prosecutor asked, “So two days after [the incident at issue], you found a weapon in the bedroom and you talked to [Defendant] about it?” Ms. Drakeford replied, “Yes, I did.” Ms. Drakeford “took the gun and put it in the closet [.]” She further testified that Defendant denied that the revolver was his. When asked who Defendant said the gun belonged to, Ms. Drakeford testified that Defendant “said the young man’s name was Michael. I am familiar with that young man. His last name is Fuller.” The prosecutor then asked, “So [Defendant] hangs around guys with guns?” Ms. Drakeford responded, “No.”

In her closing argument to the jury, the prosecutor projected a slide of an enlarged photograph of the revolver. While the image appeared, the prosecutor narrated: “On 29th of 2008, February, search warrant was issued. It was executed at the [D]efendant’s home. Gun was found”

On the contrary, it is abundantly clear from the record that only two guns were found in Brace’s closet and admitted into evidence.

4. State’s Exhibit Number 22 is a photograph of the revolver.

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

The victims' description of the gun used in the attack did not match either of the guns found in Bracey's closet.⁵ Furthermore, neither witness identified either gun as the gun used in the robbery. After Clayton "ensured that [the victims] knew the difference between a revolver and a semi-automatic[.]" he "made the determination that [the revolver] was not the weapon that was used in the robbery." Despite this determination, the revolver was the only weapon from which a DNA swab was taken, Defendant's mother was questioned solely about the revolver, and the revolver was presented to the jury by the prosecutor in her closing argument, along with the misleading narrative, "Gun was found." Moreover, although the assailant used the gun to hit Larry just above the eyebrow, opening up a bloody gash, no tissue or blood was collected from either gun.

In sum, there was not a scintilla of evidence linking either of the guns to the crimes charged.⁶ Accordingly, we conclude that the evidence about the guns was wholly irrelevant and, thus, inadmissible. See N.C. Gen. Stat. § 8C-1, Rule 402.

Having determined that the evidence of the guns was irrelevant and, thus, inadmissible, we must now determine whether Defendant is entitled to a new trial because of the error.

The State contends that the admission of the evidence is limited to plain error review as Defendant "did not timely object to . . . the admission of the guns into evidence[.]"⁷ However, the transcript of the proceedings unequivocally establishes that Defendant timely objected to the admission of both guns, and that both objections were overruled by the trial court. The State also intimates that Defendant somehow waived his objection to the evidence by "examin[ing] various witnesses at length in regard to the three [sic] handguns found."⁸

5. Although Clayton testified that "[b]oth victims . . . indicated that [the gun] was a silver, like a smokey [sic] gray, large semi-automatic handgun[.]" neither victim described the gun as "silver" and, instead, consistently described the gun's color as "smokey [sic] gray."

6. While the State could possibly have advanced a theory that the "silver" semi-automatic gun found in Bracey's locked safe was the "smoky gray" semi-automatic gun used in the attacks, no evidence was presented to support this theory and the State, instead, focused solely on the revolver in its attempt to link Defendant to the crimes charged.

7. The State contradicts itself two pages later when it asserts that "Defendant's only objection [to the guns] came when the State introduced Exhibits 16[, the revolver,] and 17[, the semi-automatic,] into evidence."

8. As explained *supra*, the State introduced evidence of *two* guns at trial. The State's brief to this Court contending that *three* guns were found profoundly misstates the evidence.

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

However, the State cites no legal authority for this proposition, and our research has revealed none.⁹ The State further contends that the admission of the evidence is limited to plain error review as Defendant “did not timely object to many references to the evidence” of the guns.¹⁰ Even assuming *ar-guendo* that a plain error standard of prejudice applies, we conclude that it was plain error to admit any evidence of the guns.

The sole issue in contention at the trial of this case was the identity of the individual who robbed Larry and Archie. The State used the evidence of the guns, and most specifically the revolver, to tie Defendant to the crime. Although the evidence before the trial court was that the revolver was *not* the gun used in the crime, the prosecutor’s case relied upon tying Defendant to the revolver and then tying the revolver to the crime. The prosecutor’s cross-examination of Defendant’s mother connected Defendant to the revolver within days of the robbery. The prosecutor published a photograph of the revolver to the jury during the trial. The prosecutor further highlighted the revolver as an important link between Defendant and the crime in her closing argument to the jury by projecting an enlarged image of the revolver while narrating, “Gun was found.” There is no tenable argument that the admission of the evidence of the guns, and the prosecutor’s reliance upon the revolver to link Defendant to the crimes charged, did not have “a probable impact on the jury’s finding that the defendant was guilty.” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citation and quotation marks omitted). We disagree with the State’s unsupported assertion that “[g]iven the substantial evidence of guilt in the record, Defendant cannot meet th[e] burden” of showing plain error. We agree with Defendant that there “is not, by any fair characterization, overwhelming evidence that [Defendant] was the robber[,]” demonstrated as follows:

The evidence indicates that Defendant was initially identified as the assailant by Lynnette. While Lynnette told Clayton that she was an eyewitness to the robberies, she admitted on the stand that

9. Indeed, we find shocking the suggestion that a party is prohibited from testing the sufficiency or credibility of evidence admitted over that party’s objection.

10. While a defendant’s failure to object to the improper admission of evidence is generally limited to plain error review on appeal, this Court is mindful of the reluctance of counsel to repeatedly interrupt his adversary in order to repeatedly object to the admission of the same evidence for fear of incurring jury and/or judicial disfavor and drawing extra attention to the evidence being objected to. *See State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002) (“[T]his Court is mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor.”).

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

she did not witness the crimes and, furthermore, that she was not even at the bus stop where the crimes were committed at the time they were committed.

Based on the false information given to Larry by Lynnette, Clayton called Larry down to the station so that Larry “could identify who did it[.]” Larry was shown a photo array created by Clayton containing Defendant’s picture. Larry did not identify his assailant the first two times he viewed the array. Believing that Larry had “paused” at picture number five, Defendant’s picture, Salmon left the room to talk with Clayton. Clayton and Larry’s mother then entered the room to lend “moral support” to Larry. After talking with Larry for five minutes, Clayton and Larry’s mother left the room, and Salmon again showed the photo array to Larry. This time, Larry identified Defendant as the assailant. Salmon went to Clayton’s room with a “smile on his face” to tell Clayton that Larry had identified Defendant in the photo array.

Based on this questionable identification, Clayton obtained a search warrant for Defendant’s home. As a result of the search, the two handguns were found. As discussed *supra*, there was not a scintilla of evidence linking either of the guns to the crimes charged.

At trial, Marcus testified that he had been given the chain by someone other than Defendant. Before allowing Marcus to continue testifying, the trial court told Marcus that he had “made an inconsistent statement under oath in this courtroom” and warned him of the penalties for perjury. Marcus then testified that Defendant had given him the chain.

Archie testified that his assailant “was built. He wasn’t fat. He was just built.” Larry described his attacker as “heavy set[.]” Clayton testified at trial that he did not consider Defendant “heavy set,” and conceded that Marcus, a six-foot, two-inch, 240-pound, right tackle for his high school football team, is “pretty big and tall and heavy set[.]” Clayton further testified, “It’s hard to mistake a—I mean, Marcus is a big boy.”

Shaquille, who was at the bus stop on the night of the robberies, testified that Defendant never left the bus stop bench and that Marcus appeared at the bus stop with the stolen chains. Larry and Archie both testified that their assailant was wearing a black shirt, blue jeans, and black sneakers.¹¹ However, Defendant was wearing a dis-

11. Clayton’s testimony illustrates that a black shirt, blue jeans, and black sneakers is a common outfit among Durham youth and relatively unhelpful as an identifying factor.

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

tinctive bright yellow t-shirt under his black shirt, which was plainly visible in the photograph Salmon retrieved from the mall, and his black pants and black shoes had unique yellow and white designs on them. Furthermore, neither of the chains were discovered in Defendant's possession.

Given the weakness in the State's evidence that Defendant was the assailant and the substantial evidence tending to show that Defendant was not the assailant, we conclude that the admission of the evidence of the guns, and the prosecutor's reliance upon the revolver to link Defendant to the crimes charged, had "a probable impact on the jury's finding that the defendant was guilty." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citation and quotation marks omitted). Accordingly, we hold that the admission of the irrelevant gun evidence amounted to plain error, for which Defendant is entitled to a new trial.

In light of this conclusion, we need not reach Defendant's remaining arguments. For the foregoing reasons, Defendant's convictions are reversed and this matter is remanded to Durham County Superior Court for a new trial.

NEW TRIAL.

Chief Judge MARTIN concurs.

Judge WYNN concurs in the result with a separate opinion.

WYNN, Judge, concurring.

In North Carolina, it is error in a trial for armed robbery to admit evidence of a gun that is in no way linked to the crime charged. Additionally, such error warrants a new trial where there is conflicting evidence of the identity of the perpetrator.¹² While I would hold in this case that the semi-automatic pistol was properly admitted as evidence, I agree with the majority that admitting the revolver was prejudicial error. Thus, I concur in awarding Defendant a new trial.

On 23 February 2008, while waiting at a bus stop at the mall, Larry Johnson and Archie Poteat were robbed of their neck chains, and Larry Johnson was struck in the face, by a heavysset man with a gun. The assailant, later identified as Defendant, was described by both young men as brandishing a gray semi-automatic pistol.

12. *State v. Patterson*, 59 N.C. App. 650, 653, 297 S.E.2d 628, 630 (1982).

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

The same evening, Larry Johnson described his assailant to a friend, Lynnette Paul. She testified that the clothes she saw Defendant wearing on that day were consistent with the description Larry Johnson provided. She testified that she observed Defendant and his companions on the bus playing with a chain that she recognized as belonging to Larry Johnson. Larry Johnson subsequently picked Defendant out of a photo lineup assembled by the detective investigating the robbery.

Based on Larry Johnson's identification of Defendant, Detective Clayton obtained a search warrant for Defendant's residence. Upon execution of the warrant, detectives retrieved two handguns: a revolver and a semi-automatic pistol from the home. Defendant was placed in custody. Defendant waived his Miranda rights, and told police that he was indeed at the mall on the date of the incident, and that he was later on the bus with Lynnette Paul. Later, detectives recovered Archie Poteat's neck chain from Defendant's brother, Tessaun, and recovered Larry Johnson's neck chain from Marcus Jackson who testified at trial that he got the chain from Defendant two or three days after the robbery.

On appeal from convictions of two counts of robbery with a dangerous weapon and one count of simple assault, Defendant contends the trial court erred by, among other things, admitting evidence of guns found in Defendant's home that were not tied to the robbery. The majority reverses Defendant's conviction on the grounds that the evidence of the guns seized from Defendant's residence was irrelevant to the charge of armed robbery. I agree that the evidence regarding the revolver was irrelevant; consequently, I concur with the majority that Defendant is entitled to a new trial.

Defendant relies on *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982), to argue that the trial court's admission of evidence regarding guns not tied to the robbery was error. The victim in *Patterson* was robbed of her wallet and car keys by a man with a gun. *Id.* at 651, 297 S.E.2d at 629. "During cross-examination of the defendant the assistant district attorney brought out testimony to the effect that there was a sawed-off shotgun in the car in addition to the pistol identified by the robbery victim." *Id.* at 652, 297 S.E.2d at 630.

Upon review, this Court held in *Patterson* that "[t]he shotgun was not connected to the robbery and it was clearly not relevant to any issues in the case. Therefore, the shotgun was erroneously admitted

STATE v. SAMUEL

[203 N.C. App. 610 (2010)]

into evidence.” *Id.* at 653, 297 S.E.2d at 630. No error was found (or alleged) in the fact that “[a] small caliber pistol which the State contend[ed] was the weapon used in the commission of the robbery was introduced and the victim identified this pistol as being very similar to the one used in the robbery.” *Id.* We held further “that there [was] a reasonable possibility that the erroneous admission of the shotgun evidence contributed to the defendant’s conviction, particularly in light of the conflicting evidence regarding the identity of the defendant as the man who robbed [the victim].” *Id.* at 653-54, 297 S.E.2d at 630.

In the present case, the witnesses described the weapon used during the robbery and assault as a large gray semi-automatic pistol. Detective Clayton identified the guns seized from Defendant’s home as being (1) a silver semi-automatic pistol, and (2) a small gray revolver. The State introduced both guns seized from Defendant’s home into evidence over Defendant’s objection. A photograph of the revolver was introduced without objection and published to the jury. I agree with the majority that admitting the revolver was prejudicial error; however, I disagree that admitting the semi-automatic pistol was error.

Regarding the semi-automatic pistol, the victims in this case were robbed by a man with a gray semi-automatic pistol. A silver semi-automatic pistol was seized from Defendant’s home. I believe this makes evidence of the semi-automatic relevant to the State’s case against Defendant, whether or not the semi-automatic seized was the same gun used in the robbery. *See State v. See*, 301 N.C. 388, 391, 271 S.E.2d 282, 284 (1980) (holding no error in State’s exhibiting to the jury a pistol similar to that used during an armed robbery); *State v. Bush*, 78 N.C. App. 686, 689, 338 S.E.2d 590, 592 (1986) (holding that a hatchet was relevant in defendant’s trial for armed robbery and assault when defendant “had access to the particular hatchet, and it was at least the same as or similar to the one used in perpetrating the crimes.”). Insofar as the majority holds evidence of the semi-automatic was not relevant, I respectfully disagree.

However, regarding the revolver, this case involved conflicting evidence regarding the identity of the man who robbed Larry Johnson and Archie Poteat. The risk of prejudice to Defendant by the admission of improper evidence was correspondingly high. Both victims testified that their assailant wielded a semi-automatic pistol. Notwithstanding, the trial court admitted evidence of a gun seized from De-

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

fendant's residence—the revolver—that was obviously not involved in the commission of the robbery. *Patterson* addressed these precise circumstances. Applying *Patterson* strictly, I concur in the result that awards Defendant a new trial.

STATE OF NORTH CAROLINA v. JONATHAN RUSSELL McCRAVEY, DEFENDANT

No. COA09-712

(Filed 4 May 2010)

1. Evidence— cross-examination—exclusion of victim's prior failed drug test—trial court's comment—failure to make offer of proof—excluded as unfairly prejudicial

The trial court did not abuse its discretion in a second-degree rape, false imprisonment, and assault inflicting serious injury case by excluding evidence of the victim's failed drug test taken some time during the prior two years. Given the totality of the circumstances, the trial court's statement regarding the exclusion did not reasonably have a prejudicial effect on the result of the trial and any error was harmless. Further, defendant did not present evidence regarding the victim's prior drug use, failed to make an offer of proof as to any further evidence that would establish a pattern of drug use, and the evidence was excluded as unfairly prejudicial under N.C.G.S. § 8C-1, Rule 403.

2. Sexual Offenders— satellite-based monitoring—aggravated offense—second-degree rape

The trial court did not err by ordering that defendant enroll in lifetime satellite-based monitoring after finding that defendant had been convicted of an aggravated offense under N.C.G.S. § 14-208.6(1a) through the use of force or the threat of serious violence. The term "aggravated offense" was not unconstitutionally vague, and defendant was convicted of second-degree rape.

Appeal by defendant from judgments entered on or about 23 July 2008 and on or about 24 July 2008 by Judge Catherine C. Eagles in Superior Court, Forsyth County. Heard in the Court of Appeals 29 October 2009.

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

Attorney General Roy A. Cooper, III, by Assistant Attorney General Catherine M. (Katie) Kayser, for the State.

M. Alexander Charns, for defendant-appellant.

STROUD, Judge.

Jonathan Russell McCravey (“defendant”) appeals from his convictions for second-degree rape, false imprisonment and assault inflicting serious injury and the order enrolling him in lifetime satellite-based monitoring upon the completion of his sentence. For the following reasons, we find no error.

I. Background

The State’s evidence tended to show that Tiffany McCravey (“Tiffany”) and defendant were married in 2000, but had separated and reconciled at least four or five times. On 24 October 2007, defendant and Tiffany were not living together. Tiffany was living with her six-year-old son Mike¹ in a house co-owned with defendant. However, because defendant had been threatening her and “had been using drugs for a while[,]” Tiffany was afraid that defendant would hurt her, and Tiffany’s sister had been staying with her “just for security.” Tiffany had not changed the locks on the doors but had barricaded them. On the night of 24 October 2007, Tiffany’s sister was not present in the home, so Tiffany and her son were the only ones in the house. Around midnight, Tiffany heard a noise and immediately got out of bed. As Tiffany turned the hallway lights on, defendant was walking up the steps from the foyer into the hallway towards the bedroom. Tiffany immediately told defendant that he was not supposed to be there and that he needed to leave. Defendant told her that he was not leaving and started hitting Tiffany with his hands, first around her head, then all over her body. Tiffany fell down but got back up. Tiffany stated that “[h]e looked as if he had been, you know, smoking or drinking or high” and she had “never seen him so angry and so violent and so upset.” Tiffany testified that defendant was “ranting and raving about someone else being in the house.” Defendant asked her if there was another man in the house and went downstairs to search the house. Defendant then dragged Tiffany down the hallway to the bedroom. Tiffany managed to get away and ran downstairs to the door but defendant jumped from the top of the stairs and caught her, saying “Bitch, you’re not going anywhere,” and

1. We have used the pseudonym “Mike” to protect the minor child’s identity.

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

he hit her. Defendant then grabbed Tiffany by the hair and began dragging her back upstairs to the bedroom. Tiffany testified that “at that time, I felt like I really needed to cooperate because he was just really—I mean, just—I had never seen him like that, like I mentioned before. At that time, he told me, he said, ‘Bitch, I ought to kill you.’” Defendant then went downstairs and returned with a steak knife. With “the knife in his hand[,]” defendant said, “Bitch, I ought to cut your fucking throat.” Defendant then ordered Tiffany into the master bathroom and went to their son Mike’s bedroom to ask him about “mommy’s boyfriend[.]” Defendant returned to the bathroom and dragged Tiffany by the hair into the bedroom and sat her on the bed. Defendant placed the knife on the night stand, then “rolled two joints[,]” put a sex movie in the DVD player and turned the television on. Defendant continued hitting Tiffany, asking her “Was this nigger worth it?” and was he worth “getting your ass beat?” Defendant told Tiffany to take off her gown and underwear. Tiffany testified that at this point:

I felt like I needed to do whatever he told me to do. I felt like inside it had to end, but I didn’t know how it was going to end. I just wanted to be alive when it did. And I decided in the bathroom, whatever he asked me to do, I was going to do it.

Defendant then told Tiffany, “Bitch, you’re going to give me some pussy.” Tiffany told him that she did not want to have sex, as she was “really in pain[,]” her lip was bleeding, her eye was swollen, and her son was upset. However, defendant told her “Yes, you are.” Tiffany stated that she “didn’t know if [defendant] was going to flip out and go in the room and try to hurt [Mike], so [her] whole thing was to try to keep him in [the bedroom] with [her] in terms of, you know, just cooperate.” Tiffany then took off her gown and underwear. Defendant ordered Tiffany on the bed and proceeded to perform oral sex on Tiffany. Defendant then ordered Tiffany to perform oral sex on him and she did. Tiffany testified that defendant then “put his penis in my vagina[.]” When defendant had finished, Tiffany asked him to take her to the hospital. Defendant initially agreed but then changed his mind and instead got her some ice and some Advil. Defendant told her to lie down to “[l]et the medicine kick in” and they both fell asleep.

Hours later, on the morning of 25 October 2007, Tiffany heard someone knocking at the door. She immediately got up and ran to the door. It was a sheriff’s deputy. Tiffany opened the door and told the deputy that her husband had been beating her and to get her son out

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

of the house. Tiffany was later transported to the hospital for treatment. She had a chipped front tooth and an orbital fracture to her right eye that required surgery. She was prescribed Vicodin for her pain and was out of work for three months. Tiffany testified that she was not using any drugs on the night in question.

Deputy Daniel Lauten of the Forsyth County Sheriff's Office testified that on the morning of 25 October 2007 he responded to a call about a suspicious vehicle parked in someone's driveway. Deputy Lauten ran the license plate and the address of the registered owner came up to an address on Asheby Road, in Belews Creek, North Carolina. Deputy Lauten then went to the address and rang the doorbell. He testified that Tiffany opened the door and said, "Thank God you're here. He's going to kill me." Deputy Lauten could tell that she had been severely assaulted, as her lips and eyes were swollen. Deputy Lauten then locked her in his patrol vehicle and called for backup. When the backup officers arrived, they searched the house and found Mike but did not find defendant. Deputy Lauten searched for weapons in the house and found one kitchen knife behind a night stand in the bedroom and another kitchen knife between the cushions of the couch in the living room. Deputy Lauten also found a "crack pipe" on the night stand in the bedroom.

Sergeant Chuck Barhaam of the Forsyth County Sheriff's Office testified that on 25 October 2007 he responded to Deputy Lauten's call for backup and went inside the home to search for defendant and Mike. Sergeant Barhaam testified that they did not find defendant in the home but set up a perimeter in an effort to locate defendant. Deputies later found defendant hiding in a nearby residence which was under construction and took defendant into custody.

Corporal Amy Snider-Wells of the Forsyth County Sheriff's Office testified that Tiffany told her that she had a 50B domestic violence restraining order against defendant for two years but it had expired in August 2007. Corporal Snider-Wells interviewed defendant at the Forsyth County Sheriff's Office. Defendant told Corporal Snider-Wells that he beat up his wife because she had another man in his home. Defendant initially denied having sex with his wife, but then told Corporal Snider-Wells that they did have a sexual encounter, but it was consensual.

Defendant testified in his own defense, stating that on 24 October 2007, he and Tiffany were not living together, but he was staying at his cousin's house up the street. Defendant admitted that he was on pro-

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

bation and, as part of that probation, he was not supposed to be around Tiffany. Defendant also admitted that as part of his probation he was on electronic house arrest, but he had violated his probation by cutting his electronic ankle bracelet off his leg. Defendant testified that Tiffany called him around 9:30 p.m. on 24 October 2007 to ask if he would come over to their house with some cocaine. Defendant stated that he arrived at their house around 11 p.m. and entered the back door using his key. Defendant stated that he went to the bedroom and Tiffany was awake watching television. Defendant testified that they snorted some of the cocaine that he brought and had oral sex and then intercourse. Defendant stated that while they were having intercourse, he heard something downstairs. He went to the kitchen, got a knife, and looked around the rest of the house. Defendant went back to the bedroom and asked Tiffany if anyone was in the house. Defendant then noticed that the bag of cocaine which had been in his pants pocket was missing. Defendant then asked Tiffany about the cocaine but “she said she didn’t know what I was talking about.” Defendant testified, “That’s when I hit her, because I knew she was lying.” Defendant admitted to hitting Tiffany for “about a good five/eight minutes[,]” but claimed it was after they had intercourse. Defendant stated that Tiffany asked him to take her to the hospital, but instead he gave her some ice and Advil, and they both fell asleep. Defendant testified that the next thing he remembered was waking up and hearing the doorbell ringing. After defendant discovered that a deputy sheriff was at the door, he fled the house but was later found by deputies and taken into custody.

On or about 28 January 2008, defendant was indicted on charges of first-degree rape, first-degree kidnapping and felony assault inflicting serious bodily injury. Defendant was tried on these charges at the 21 July 2008 Criminal Session of Superior Court, Forsyth County. On 23 July 2008, the jury found defendant guilty of second-degree rape, false imprisonment, and misdemeanor assault inflicting serious injury. The trial court then sentenced defendant to consecutive terms of 100 to 129 months imprisonment for the second-degree rape, 45 days for false imprisonment and 75 days for assault inflicting serious injury. The trial court also ordered defendant to enroll in lifetime satellite-based monitoring upon completion of his sentences. Defendant gave notice of appeal in open court.

II. Trial Court’s Comments

[1] Defendant first contends that when defense counsel asked Tiffany about a prior drug test, the trial court made an impermissible

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

opinion statement which interfered with defendant's impeachment of the witness as well as defendant's right to present a defense.

N.C. Gen. Stat. § 15A-1222 (2007) provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." "It is immaterial how such opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence or in any other manner." *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 421 (1988) (citation and quotation marks omitted). "In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citation and quotation marks omitted). "While not every improper remark will require a new trial, a new trial may be awarded if the remarks go to the heart of the case." *State v. Sidbury*, 64 N.C. App. 177, 179, 306 S.E.2d 844, 845 (1983) (citation omitted). "Whether the judge's language amounts to an expression of opinion is determined by its probable meaning to the jury, not by the judge's motive." *State v. Springs*, — N.C. App. —, —, 683 S.E.2d 432, 435 (2009) (citations and quotation marks omitted).

Defendant challenges the trial court's statement, "This isn't about anybody's drug use[.]" made in the following exchange during defense counsel's cross-examination of victim, Tiffany:

Defense Counsel: Now, you said that last time you used marijuana was seven and a half years ago, is that right?

Tiffany: Yes, about; yes.

Defense Counsel: But you've used cocaine before as well, haven't you?

Tiffany: No, I have not.

The Court: Sustained. This is not about anybody's drug use.

Defense Counsel: Can we approach the bench, Your Honor?

The Court: No.

Defense Counsel: So on the evening in question, there was no other use on your part of any drugs; is that right?

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

Tiffany: No, I did not use any drugs.

Following the above exchange and out of the presence of the jury, defense counsel and the trial court had the following discussion about the trial court's comment:

The Court: All right. Did you want to say anything about my not letting you ask her about the cocaine?

Defense Counsel: Yes, Your Honor. For the record, I would be asking—I would ask her that and also followed up with a question of isn't it true that you failed the drug test in Guilford County that showed the presence of cocaine within the last two years, which under *State versus Williams* would go to her ability to see, hear and recall potentially as well as since I believe our offer of evidence later on will also relate to potential drug use that evening.

The Court: Well, you can ask her—I let you ask all you wanted about her drug use that evening. So you're not saying that this drug test was close to that day?

Defense Counsel: No, it's not. Not within the time frame that would be something she would still be under the influence. The only question, it may show a pattern wherein when she denies the fact that she had used it and then there is a—may have to admit that there was a positive screen for cocaine within a recent time period. *State versus Williams* was a two-year range. But I don't need to follow up any further. I'll put it on in direct at that point.

The Court: Okay. Well, *State versus Williams* is a very different case from this one; that one involved substantial mental health issues and—

Defense Counsel: I think it involved a suicide question; yes.

The Court: Yes. I mean, there is absolutely nothing to—

Defense Counsel: They did indicate in *State versus Williams* that potential drug use would affect your ability to see, hear and recall, so . . .

The Court: Well, that's not how I remember the facts of that case playing out, and it's extremely different from this. One-time cocaine use in the last seven and a half years is not relevant to somebody's credibility. And this is not about her drug use. So . . .

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

Defense Counsel: I wouldn't contend it was a one-time cocaine use, but it's also—it's not a credibility issue either.

The Court: Well, what is it if it's not credibility? What's it relevant to?

Defense Counsel: Later evidence from the defense will indicate that there was some [drug use during] that evening which would be a pattern of the parties. And clearly over the objection of the defense, the State brought out that Mr. McCravey has used drugs during the time period that they have been involved together on a regular basis.

The Court: All right. Well, I think we allowed enough questions about that under Rule 404, it's certainly—I don't see that it's relevant at all, but if it is it's marginal; and substantial unfair prejudice involved.

Defense Counsel: —Court's ruling.

The Court: All right. Anything else we need to do in this?

Assistant District Attorney: Not for the State, Your Honor.

The Court: All right. You all are excused until 9:30 tomorrow morning.

In context, the trial court's comment was a ruling by the trial court as to the admissibility of evidence of Tiffany's prior drug usage, specifically her failure of a drug test at some time during the prior two years. Defendant argues that the trial court erred in making the above statement as it (1) was an impermissible opinion, (2) interfered with his cross-examination of Tiffany, and (3) was based on N.C. Gen. Stat. § 8C-1, Rule 404.

A. Impermissible Opinion

Defendant contends that the trial court's statement improperly influenced the jury to believe that "drug usage [was] irrelevant and was very damaging to the accused's theory of the case[.]"

Defendant argues that drug usage was very relevant to his case as he contended that on the night in question, he and Tiffany used cocaine together, then had consensual intercourse, and after intercourse, he discovered his cocaine missing and assaulted his wife. Defendant contends that the trial court improperly influenced that jury to believe that Tiffany's drug use was not relevant to the case and undermined defendant's theory before the jury.

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

The trial court's statement was made during defense counsel's cross-examination of Tiffany. Based upon defendant's contentions as to the events of the evening, Tiffany's use of cocaine on that night goes to "the heart of the case[.]" as it would support defendant's order of events, including the fact that the intercourse with Tiffany was consensual. *Springs*, — N.C. App. at —, 683 S.E.2d at 436. However, the trial transcript shows that immediately following the trial court's statement—"This is not about anybody's drug use[.]"—the trial court permitted defense counsel to ask Tiffany whether she was using any drugs on the night of 24 October 2007. Allowing defense counsel to question Tiffany about her drug use on the night in question clearly demonstrated to the jury that Tiffany's drug use on that night was relevant and allowed defendant the opportunity to introduce evidence supporting his defense. In the context of the entire transcript, particularly defendant's questioning of Tiffany regarding her drug use on the night of the incident and defendant's later testimony regarding the same, the trial court's statement would not influence the jury to believe that Tiffany's drug use was "irrelevant[.]" Furthermore, during the final charge to the jury, the trial court instructed:

The law, as indeed it should, requires the presiding judge to be impartial. You should not draw any inference from a ruling I have made, expression on my face, inflection in my voice, or anything I've said or done that I have any opinion about any aspect of this case. It is your exclusive province to find the facts of this case and to render a verdict reflecting the truth as you find it.

Therefore, given the "totality of the circumstances[.]" the trial court's statement did not "reasonably have . . . a prejudicial effect on the result of the trial" and any error by the trial court is "considered harmless." *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808.

B. The Trial Court's Exclusion of Evidence

Defendant also contends that the trial court's statement and interference with cross-examination regarding Tiffany's prior drug use interfered with his right to present his defense fully, because he was not allowed to introduce evidence that established a pattern of drug usage by Tiffany. Defendant argues that the trial court's ruling excluding this evidence was in error.

This Court has previously held that "[t]o prevail on a contention that evidence was improperly excluded, either a defendant must

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

make an offer of proof as to what the evidence would have shown or the relevance and content of the answer must be obvious from the context of the questioning.” *State v. Stiller*, 162 N.C. App. 138, 142, 590 S.E.2d 305, 307 (2004) (quoting *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157, *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1996)). Further,

[t]his Court has explained that ‘[t]he reason for such a rule is that the essential content or substance of the witness’ testimony must be shown before we can ascertain whether prejudicial error occurred. In the absence of an adequate offer of proof, we can only speculate as to what the witness’ answer would have been.’

State v. Jacobs, — N.C. App. —, —, 673 S.E.2d 724, 730 (2009) (quoting *State v. Clemmons*, 181 N.C. App. 391, 397, 639 S.E.2d 110, 114, *aff’d*, 361 N.C. 582, 650 S.E.2d 595 (2007)). The record shows that plaintiff did not make a specific offer of proof as to any evidence of Tiffany’s prior drug use which was excluded by the trial court’s ruling. The only additional evidence as to Tiffany’s drug use mentioned in the record is defense counsel’s above-quoted argument to the trial court that he wanted to ask Tiffany about a positive drug test at some point during the previous two years. We cannot speculate as to any additional evidence which defendant may have wanted to present regarding Tiffany’s prior drug use, and we fail to see how evidence of one positive drug test within a two-year period would establish a “pattern” of drug use by Tiffany. Additionally, defendant was allowed to testify that he and Tiffany “periodically” used cocaine and that they used cocaine on the night in question. Because defendant did present evidence regarding Tiffany’s prior drug use and because defendant failed to make an offer of proof as to any further evidence that would establish a pattern of drug use, we conclude that defendant has not properly preserved any objection regarding exclusion of evidence of Tiffany’s prior drug use for review. Accordingly, we dismiss this argument.

C. Ruling based on N.C. Gen. Stat. § 8C-1, Rule 404

Defendant also argues that the trial court erred by stating that the ruling on the admissibility of Tiffany’s prior drug use was pursuant to N.C. Gen. Stat. § 8C-1, Rule 404. As noted above, defendant failed to make an offer of proof as to any additional evidence of Tiffany’s prior drug use, so the only possible evidence we can consider is based upon defense counsel’s statement that he wanted to ask her about a positive drug test within the prior two years. Prior to the trial court’s

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

ruling on the admissibility of evidence of Tiffany's prior drug use, defense counsel made the following comment about the trial court's prior ruling on another issue: "And clearly over the objection of the defense, the State brought out that Mr. McCravey has used drugs during the time period that they have been involved together on a regular basis." In response to defense counsel's comment about her prior ruling, the trial court stated: "Well, I think we allowed enough questions about *that* under Rule 404[.]" (emphasis added). Therefore, in context, the trial court was simply responding to defense counsel's comments as to her prior ruling on the admissibility of evidence pursuant to Rule 404(b). As to the admissibility of evidence of Tiffany's prior drug use, the trial court then proceeded to exclude such evidence as there was "substantial unfair prejudice involved" pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 ("relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); *See State v. Locklear*, 363 N.C. 438, 448-49, 681 S.E.2d 293, 302 (2009) (Our appellate courts "review a trial court's decision to admit or exclude evidence under Rule 403 for abuse of discretion[,] and "reverse the trial court only when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." (citations and quotation marks omitted)). Defendant makes no argument as to how the trial court abused its discretion in making its ruling based on Rule 403. Therefore, we find no abuse of discretion in the trial court's ruling on exclusion of evidence that Tiffany had a positive drug test within the prior two years.

III. Satellite Based Monitoring

[2] Defendant next contends that the trial court erred when it ordered that defendant enroll in lifetime satellite based monitoring ("SBM") after finding that defendant had been convicted of an "aggravated offense." This Court has held that the standard of review for SBM orders is as follows: "[W]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.'" *State v. Kilby*, — N.C. App. —, —, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004)). Here, pursuant to N.C. Gen. Stat. § 14-208.40A, the trial court found defendant

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

had been convicted of a “reportable conviction” as defined by N.C. Gen. Stat. § 14-208.6(4). The trial court also found that defendant was convicted of an “aggravated offense” as defined by N.C. Gen. Stat. § 14-208.6(1a) and ordered that upon completion of defendant’s sentence, defendant was required to enroll in SBM for his natural life.

N.C. Gen. Stat. § 14-208.6(1a) (2007) defines an “aggravated offense” as

any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the *use of force* or the threat of serious violence[.] (emphasis added).

Defendant contends that the statutory definition of “aggravated offense” in N.C. Gen. Stat. § 14-208.6(1a) is unconstitutionally vague because it does not specify what constitutes “use of force[.]”

It is settled law that a statute may be void for vagueness and uncertainty. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.

In re Burrus, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) (citations and quotation marks omitted). “Statutory language should not be declared void for vagueness unless it is not susceptible to reasonable understanding and interpretation. Mere differences of opinion as to a statute’s applicability do not render it unconstitutionally vague.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 187, 594 S.E.2d 1, 19 (2004) (citations omitted). We apply the rules of statutory interpretation to discern the meaning of N.C. Gen. Stat. § 14-208.6(1a). *Id.*

“Statutory interpretation begins with [t]he cardinal principle of statutory construction . . . that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish.” *Benton v. Hanford*, — N.C. App. —, —, 671 S.E.2d 31, 34 (2009) (citation and quotation marks omitted). “Where the

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.” *In re Nantz*, 177 N.C. App. 33, 40, 627 S.E.2d 665, 670 (2006) (citation and quotation marks omitted). “If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to defeat or impair the object of the statute [. . .] if that can reasonably be done without doing violence to the legislative language.” *Arnold v. City of Asheville*, 186 N.C. App. 542, 548, 652 S.E.2d 40, 46 (2007) (citations and quotation marks omitted).

In so doing, a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in *pari materia*, the preamble, the title, and other like means Statutory provisions must be read in context[,] [and those] dealing with the same subject matter must be construed in *pari materia*, as together constituting one law, and harmonized to give effect to each.

Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 123, 619 S.E.2d 862, 865 (2005).

Defendant argues that “use of force” is a “term of art” and the statute does not specify whether it means “deadly force[,] . . . excessive force, unreasonable force, *de minimis* force, or reasonable force.” The plain language of N.C. Gen. Stat. § 14-208.6(1a) does not specify what type of force is required, and Article 27A of Chapter 14 of the General Statutes does not specifically define what type of force N.C. Gen. Stat. § 14-208.6(1a) is referencing or provide for any further definition of force. However, if we consider the context of the definition of “aggravated offense” stated in N.C. Gen. Stat. § 14-208.6(1a), the meaning of “use of force” becomes clear. First, we note that to be subject to SBM, a defendant must have a “reportable conviction” as defined by N.C. Gen. Stat. § 14-208.6(4). Pursuant to N.C. Gen. Stat. § 14-208.6(4), a “reportable conviction” includes conviction of “a sexually violent offense.” N.C. Gen. Stat. § 14-208.6(5) states that a “sexually violent offense” includes second degree rape pursuant to N.C. Gen. Stat. § 14-27.3. Thus, second-degree rape is a “reportable conviction.” See N.C. Gen. Stat. §§ 14-208.6(4) and 14-208.6(5). Only a “reportable conviction” can be an “aggravated offense” as defined by N.C. Gen. Stat. § 14-208.6(1a). We therefore look to N.C. Gen. Stat. § 14-27.3, which defines second-degree rape, to determine if this

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

crime is an “aggravated offense.” See *State v. Davison*, — N.C. App. —, —, 689 S.E.2d 510, 517 (2009) (The determination of whether an offense is an “aggravated offense” pursuant to N.C. Gen. Stat. § 14-208.40A is based solely upon “the elements of the offense of which a defendant was convicted and . . . not . . . the underlying factual scenario giving rise to the conviction.”). Second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3 (2007) includes the element that the criminal offense be committed “by force and against the will of the other person[.]” We note that N.C. Gen. Stat. § 14-27.3, like N.C. Gen. Stat. § 14-208.6(1a), does not include a definition of “force,” but the force required in a sexual offense of this nature has been well-defined by case law.

Sexual offenses such as first-degree rape pursuant to N.C. Gen. Stat. § 14-27.2 (2007), second-degree rape pursuant to N.C. Gen. Stat. § 14-27.3, first-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4 (2007), and second-degree sex offense pursuant to N.C. Gen. Stat. § 14-27.5 (2007), all include the element that the criminal offense be committed “by force and against the will of the other person[.]” In the context of the above-enumerated sexual offenses, our Supreme Court has determined that the statutory phrase, “by force and against the will of the other person,” means the same as it did at common law. *State v. Locklear*, 304 N.C. 534, 539, 284 S.E.2d 500, 503 (1981). Our Courts have further defined the element of force in these sexual offenses by stating that “[t]he requisite force may be established either by actual physical force or by constructive force in the form of fear, fright, or coercion. ‘Physical force’ means force applied to the body.” *State v. Scott*, 323 N.C. 350, 354, 372 S.E.2d 572, 575 (1988) (citations omitted). “Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim’s submission to sexual acts. Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat.” *State v. Hardy*, 104 N.C. App. 226, 231, 409 S.E.2d 96, 98-99 (1991) (citations and quotation marks omitted). The language of N.C. Gen. Stat. § 14-208.6(1a)—“through the *use of force* or the threat of serious violence”—reflects the established definitions as set forth in case law of both physical force and constructive force, in the context of the sexual offenses enumerated in N.C. Gen. Stat. §§ 14-27.2, 14-27.3, 14-27.4, and 14-27.5. (emphasis added).

The legislature intended that the same definition of force, as has been traditionally used for second-degree rape, to apply to the deter-

STATE v. McCRAVEY

[203 N.C. App. 627 (2010)]

mination under N.C. Gen. Stat. § 14-208.6(1a) that an offense was committed by “the use of force or the threat of serious violence.” Given the similarity in the language describing the use of force as to the above-referenced criminal sexual offenses and the Legislature’s use of the phrase “through the use of force or the threat of serious violence” in the statutory definition of “aggravated offense” in N.C. Gen. Stat. § 14-208.6(1a), a defendant would adequately be warned as to the conduct that would fall into the definition of an “aggravated offense” which could subject him to SBM. *Burrus*, 275 N.C. at 531, 169 S.E.2d at 888. Therefore, we hold that the definition of “aggravated offense” in N.C. Gen. Stat. § 14-208.6(1a) is not unconstitutionally vague.

Defendant further argues that even if the Court does not find that the statute is void for vagueness, the particular facts of this case do not constitute an “aggravated offense” pursuant to N.C. Gen. Stat. § 14-208.6(1a). However, as stated above, defendant’s argument has been rejected by this Court in *Davison*, — N.C. App. at —, 689 S.E.2d at 517 (“[W]hen making a determination pursuant to N.C.G.S. § 14-208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction.”). Here, defendant was convicted of second-degree rape. The essential elements of second-degree rape include vaginal intercourse “[b]y force and against the will of the other person[.]” N.C. Gen. Stat. § 14-27.3(a)(1). Defendant does not contend that he did not have intercourse with Tiffany, but only that this act was not “by force and against” her will. The jury rejected defendant’s contention that the intercourse was consensual and found that it was “by force and against” Tiffany’s will by finding him guilty of second-degree rape. As the essential elements of second-degree rape are covered by the plain language of “aggravated offense” as defined by N.C. Gen. Stat. § 14-208.6(1a), we hold that second-degree rape is an “aggravated offense” and the trial court did not err in ordering defendant to lifetime SBM pursuant to N.C. Gen. Stat. § 14-208.40A.

IV. Conclusion

As the trial court’s comments were not prejudicial to the defendant, the trial court did not abuse its discretion in excluding evidence as to Tiffany’s prior drug use, and the trial court did not err in ordering defendant to enroll in lifetime Satellite Based Monitoring, we find no error.

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

NO ERROR.

Judges STEPHENS and BEASLEY concur.

MARY ADKINS, PLAINTIFF-APPELLANT v. STANLY COUNTY BOARD OF EDUCATION; NELSON TALLY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; MELVIN POOLE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; MITCHELL EDWARDS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; DAN MCSWAIN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; AND CHRISTOPHER WHITLEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEFENDANTS-APPELLEES

No. COA09-638

(Filed 4 May 2010)

Civil Procedure— judge erroneously reconsidered legal conclusion of another judge—summary judgment—improperly granted

The trial court erred by granting defendants' motion for summary judgment on plaintiff's § 1983 claims and state constitutional claim based on allegations that defendants declined to renew plaintiff's employment contract in retaliation for plaintiff having filed a complaint in 2000. Judge Spainhour ruled as a matter of law that plaintiff's claims survived defendant's motion to dismiss because plaintiff's 2000 complaint touched on a matter of public concern, and defendant's motion for summary judgment brought this same issue before Judge Beale. Judge Beale was without authority to disregard Judge Spainhour's judicial determination and grant summary judgment on the basis that the 2000 complaint did not relate to a matter of public concern.

Appeal by Plaintiff from order entered 9 January 2009 by Judge Michael E. Beale in Superior Court, Stanly County. Heard in the Court of Appeals 18 November 2009.

Ferguson, Stein, Chambers, Gresham, & Sumter, P.A., by John W. Gresham, for Plaintiff-Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson and Elizabeth V. LaFollette, for Defendants-Appellees.

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh, for North Carolina Advocates for Justice; Katherine

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

Lewis Parker, Legal Director, for ACLU of North Carolina; Thomas M. Stern for North Carolina Association of Educators; and J. Michael McGuinness for North Carolina Troopers Association, amici curiae.

Katherine J. Brooks, Staff Attorney, and Allison B. Schafer, General Counsel, for North Carolina School Boards Association, amicus curiae.

McGEE, Judge.

Mary Adkins (Plaintiff) was employed as an Assistant Superintendent by the Stanly County Board of Education (the Board) in 2004, when the Board reviewed Plaintiff's employment contract and voted five to four not to renew her contract. Plaintiff filed a complaint on 3 May 2007, alleging two causes of action: one filed pursuant to "the provisions of Article I, §§ 1, 14, 18, and 19 of the Constitution of North Carolina;" and the second filed pursuant to "the First and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. § 1983." In her complaint, Plaintiff named as Defendants the Board and Board members Nelson Tally, Melvin Poole, Mitchell Edwards, Dan McSwain, and Christopher Whitley (the Board Members), each in his individual and official capacity.

Defendants filed an answer and a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), on 30 July 2007. In an order filed 21 December 2007, Judge Erwin Spainhour denied Defendants' motion to dismiss as to: (1) Plaintiff's § 1983 claims against the Board and Board Members in their official capacity for injunctive relief, (2) Plaintiff's § 1983 claim for damages against the Board members in their individual capacity, and (3) Plaintiff's state constitutional claim against the Board Members in their official capacity. Judge Spainhour determined that these claims, in the present action before us, survived Defendants' motion to dismiss on the grounds that: (1) Plaintiff had filed a complaint in 2000 (the 2000 complaint) against Defendant Tally and the Board for allegedly violating certain statutory rights regarding her employment; (2) the 2000 complaint touched on a matter of public concern; and (3) therefore Plaintiff properly stated certain claims in this action under 42 U.S.C. § 1983, as well as the North Carolina Constitution, alleging that Defendants declined to renew her employment contract in retaliation for Plaintiff having filed the 2000 complaint. Judge Spainhour granted Defendants' motion to dismiss as

to Plaintiff's remaining state constitutional claim against the Board and the Board Members in their individual capacity.

Following discovery and mediation, Defendants filed a motion for summary judgment on 4 December 2008. Judge Michael Beale granted Defendants' motion for summary judgment in an order filed on 9 January 2009. Plaintiff appeals.

Factual Background

The dispute addressed in Plaintiff's appeal originated in 2000, when Plaintiff and another Assistant Superintendent, Larry Wood (Wood), filed the 2000 complaint against Nelson Tally (Tally) and the Board. In 2000, recently-elected board members Tally and Melvin Poole (Poole) raised questions about the salaries being paid to Plaintiff and Wood. Tally voiced these questions to the local press and made what Plaintiff characterized as "defamatory statements concerning Plaintiff and Wood." These statements led to a reduction in the salaries of Plaintiff and Wood by the Board.

In their 2000 complaint, Plaintiff and Wood alleged claims against Tally for slander and libel and for violation of their statutory rights under N.C. Gen. Stat. §§ 115C-319, 321, and 325; and claims against the Board for breach of their employment contracts. Plaintiff and Wood resolved their claims with the Board and Tally in 2001, with their salaries restored, their contracts extended through 30 June 2004, and a confidential monetary settlement with Tally.

Plaintiff's contract again came before the Board for consideration in May 2004. The acting Superintendent of Schools recommended that the Board renew Plaintiff's contract; however, the Board voted five to four not to renew her contract. Wood had already retired and was not under consideration for contract renewal. Plaintiff filed this action against Defendants in 2007, alleging that the Board failed to renew her contract in retaliation for Plaintiff's having filed the 2000 complaint.

Analysis

We review a trial court's order granting summary judgment *de novo*, viewing the evidence in the "light most favorable to the non-moving party[.]" *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) (citations omitted). We are to determine "whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

matter of law.” *Taylor v. Coats*, 180 N.C. App. 210, 212, 636 S.E.2d 581, 583 (2006).

Plaintiff first argues that Judge Beale erred by granting Defendants’ motion for summary judgment. Specifically, Plaintiff contends that Judge Beale erred in finding that Plaintiff’s 2000 complaint did not relate to a matter of public concern, because Judge Beale was “[w]ithout [a]uthority to [d]isregard [a] [p]rior [j]udicial [d]etermination” to the contrary.

Our Supreme Court has held

that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another’s errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

State v. Woolridge, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (quoting *Calloway v. Ford Motor Company*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)).

In *Madry v. Madry*, 106 N.C. App. 34, 415 S.E.2d 74 (1992), our Court addressed the question of one trial judge reconsidering an issue already decided by another trial judge in a case involving a procedural situation similar to the case before us. The plaintiff in *Madry* filed for divorce after the defendant was stricken by a cerebral hemorrhage causing “severe and permanent brain damage and partial paralysis.” *Id.* at 35, 415 S.E.2d at 75. The defendant filed an answer and later moved to amend that answer to assert that the parties separated due to the defendant’s “incurable insanity[,]” and that the divorce action must therefore be brought in accordance with N.C. Gen. Stat. § 50-5.1. *Id.*, 415 S.E.2d at 75-76. At the hearing on the motion to amend the defendant’s answer, Judge James Fullwood “ruled that [the] defendant had failed to present evidence that she was ‘incurably insane’ and concluded that ‘[N.C.G.S. § 50-5.1] does not apply in [that] action.’ ” *Id.* at 36, 415 S.E.2d at 76.

The defendant in *Madry* later moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), arguing that, because the defendant was “incurably insane[,]” the plaintiff’s divorce action must be brought in accordance with N.C.G.S. § 50-5.1. *Id.* At the hearing for the defendant’s Rule 12(b)(6) motion, Judge Fred Morelock “converted [the] defendant’s motion to one for summary judgment . . . [and] granted summary judgment in favor of [the] defendant

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

and dismissed [the] plaintiff's claim for relief pursuant to [N.C. Gen. Stat. §] 50-6 stating that "[N.C. Gen. Stat.] § 50-5.1 provides the exclusive remedy" for the plaintiff under those circumstances. *Id.*

The plaintiff appealed Judge Morelock's order granting summary judgment in favor of the defendant, and our Court reversed. We discussed the case as follows:

Despite the fact that Judge Morelock's order is denominated a summary judgment, the legal issue decided by that judgment, whether G.S. 50-5.1 bars this plaintiff's claim for absolute divorce pursuant to G.S. 50-6, was *precisely the same issue* decided to the contrary by Judge Fullwood's earlier order denying defendant's motion to amend. The materials and arguments considered by Judge Morelock were essentially the same arguments and materials considered by Judge Fullwood. Simply labeling the order a summary judgment did not change its essential character nor authorize Judge Morelock to overrule Judge Fullwood.

[The d]efendant's motion to amend was a request addressed to the discretion of the trial judge. There were no changed circumstances however which would justify Judge Morelock's reconsideration of this issue. . . . It is obvious from the record that, in filing her 12(b)(6) motion, [the] defendant was simply attempting to again put before the court those contentions that Judge Fullwood had rejected.

We hold that Judge Morelock committed reversible error in ruling that G.S. 50-5.1 is the exclusive remedy for this plaintiff when Judge Fullwood had previously ruled otherwise.

Id. at 38, 415 S.E.2d at 77 (citation omitted, emphasis added).

Our Courts have thus clearly held that one judge may not reconsider the legal conclusions of another judge. *Woolridge*, 357 N.C. at 549-50, 592 S.E.2d at 194. There is a limited exception to this rule for interlocutory orders addressed to the discretion of the trial court: "If the initial ruling is one which was addressed to the discretion of the trial judge, another trial judge may rehear an issue and enter a contradictory ruling if there has been a material change in the circumstances of the parties." *Madry*, 106 N.C. App. at 38, 415 S.E.2d at 77; *see also Calloway v. Ford Motor Company*, 281 N.C. 496, 502, 189 S.E.2d 484, 489 (1972) ("When a judge . . . rules as a matter of law, whether he allows or disallows the motion[,], [n]o discretion is

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

involved and his ruling finally determines the rights of the parties unless it is reversed upon appeal.”).

In *Madry*, the initial ruling at issue was addressed to the discretion of the trial judge. *Madry*, 106 N.C. App. at 38, 415 S.E.2d at 77. Therefore, our Court conducted an analysis of whether changed circumstances allowed the second judge to overrule the first. *Id.* However, in the case before us, Judge Spainhour’s ruling that Plaintiff’s 2000 complaint touched on a matter of public concern was not a ruling addressed to Judge Spainhour’s discretion; rather, it was a ruling as a matter of law. Because Judge Spainhour ruled as a matter of law, “[n]o discretion [was] involved and his ruling finally determine[d] the rights of the parties” as to the issue of whether the 2000 complaint touched on a matter of public concern. *Calloway*, 281 N.C. at 502, 189 S.E.2d at 489. Judge Beale was therefore without authority to reconsider Judge Spainhour’s determination.

Defendant contends that Judge Beale was not prohibited from granting summary judgment because “denial of a previous motion to dismiss made under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) . . . does not prevent the trial court from granting a subsequent motion for summary judgment.” *Rhue v. Pace*, 165 N.C. App. 423, 426, 598 S.E.2d 662, 664-65 (2004). Our Court has held that “[w]hile one superior court judge may not overrule another, [a motion for summary judgment and a motion to dismiss pursuant to Rule 12(b)(6)] do not present the same [legal] question.” *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 255 (1978). The trial court’s standards for a Rule 12(b)(6) motion to dismiss and a motion for summary judgment are different and present separate legal questions. *See Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (noting that N.C.G.S. § 1A-1, Rule 12(b)(6) allows dismissal of a claim where: “(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim”); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009) (stating that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law”). However, comparing the two orders at issue before us in light of the legal context established by Judge Spainhour and applied by Judge Beale, we determine that Defendants’ motion for summary judgment brought before Judge

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

Beale an issue already resolved by Judge Spainhour. Judge Beale was presented the opportunity to rule on the very same legal question as Judge Spainhour: whether Plaintiff's 2000 complaint touched on a matter of public concern.

We first compare the claims alleged in the complaint and how they were considered in each of the orders. The complaint contains the following pertinent language:

FIRST CAUSE OF ACTION

29. The Actions of [Defendants] as set out herein violated Plaintiff's rights provided to her under the provisions of Article I, §§ 1, 14, 18, and 19 of the Constitution of North Carolina.
30. As a proximate result of Defendants' actions, Plaintiff has suffered monetary loss as well as loss of professional status and professional opportunity. She seeks damages in excess of \$10,000.

SECOND CAUSE OF ACTION

31. The actions of [Defendants] as set out herein violated Plaintiff's rights as set out in the First and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. § 1983.
32. As a proximate result of Defendants' actions, Plaintiff has suffered monetary loss as well as loss of professional status and professional opportunity. She seeks damages in excess of \$10,000.

Judge Spainhour's order was structured as follows. The order begins with a determination that Plaintiff has stated two viable claims: (1) under 42 U.S.C. § 1983 based on a violation of rights protected by the First Amendment to the United States Constitution (the federal claim); and (2) a claim under the North Carolina Constitution of rights protected by Article I §§ 1, 14, 18, and 19 (the state claim). Judge Spainhour then made the following determination:

[This court] has reached this determination by applying the applicable standard of review to the Motion to Dismiss. In reviewing such a motion [this court] accepts this allegation contained in the complaint as true. The complaint states that Plaintiff served as an assistant superintendent in the Stanly County School System and performed her duties in an exemplary manner when

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

her employment was terminated in May of 2004. In 2000 Plaintiff and another assistant superintendent brought an action against [the Board and Tally] alleging as one of their three claims that [Tally] had violated their statutory rights. Specifically, [Tally] had obtained personnel documents of [Plaintiff and Woods] by virtue of his public position of trust as a member of the school Board and that Tally transmitted these documents without authorization to a newspaper reporter. The 2000 Complaint further alleged that documents which [Tally] provided were protected by the provisions of N.C.G.S. §§115C-319, 321 and 325 [sic]. The 2000 Complaint then alleged that “Defendant Tally’s actions in discharging [sic] the documents were not authorized by the Board of Education or by any statutory provisions.” *Thus, the 2000 [complaint] raised an issue of public concern, the disclosure to the media of statutorily protected information concerning Plaintiff by an elected Board member who is also a Defendant in this matter.* [This court] has determined that such a claim is of concern not only to the employees of the Stanly County School System, but also to the voters of Stanly County.

(Emphasis added.)

Judge Spainhour then summarized that “the facts before the [c]ourt are that Plaintiff filed a prior action raising issues of public concern, that she met all of the requirements for a new contract and that the Board, at the first opportunity after the settlement of her prior lawsuit, terminated her for no articulated reason.” Next, Judge Spainhour stated that, following the requirements of *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), Defendants were entitled to dismissal as to Plaintiff’s state claim against the Board and her federal claim against the Board Members in their official capacity. Further, Judge Spainhour stated that, “[a]s to Plaintiff’s state constitutional claim, she may pursue a damage claim against the Board members in their official capacity[,]” but not in their individual capacity. Thus, Judge Spainhour’s order is clear that, apart from the capacities in which the Defendants were sued, the determination of whether the 2000 complaint touched on a matter of public concern was the dispositive question for determining whether Plaintiff’s state and federal claims should survive Defendants’ motion to dismiss.¹

1. A claim under 42 U.S.C. § 1983 may arise upon “retaliation by a public official for the exercise of a constitutional right[.]” *Toomer v. Garrett*, 155 N.C. App. 462, 478, 574 S.E.2d 76, 89 (2002); 42 U.S.C. § 1983 (2009). Such retaliation may include the fir-

In comparison, Judge Beale's order was structured as follows:

Reviewing the entire record, and considering the evidence in the light most favorable to Plaintiff, Plaintiff has brought forth no evidence that presents a genuine issue as to any material fact on the issue of whether her initial [complaint] in 2000 against [the Board and Tally] related to a matter of public concern. Applying the summary judgment standard, the record demonstrates that Plaintiff's initial [complaint], which was settled in her favor, *did not relate to a matter of political, social, or other concern to the community*, and said [complaint] was nothing more than [an] attempt to advance Plaintiff's career and protect her job and her personal reputation. The record further demonstrates that Plaintiff was not attempting to advance the rights of the general citizenry and that Plaintiff's initial [complaint] was not intended, nor did it raise, a public debate on the propriety of a public official releasing information in a personnel file.

...

Plaintiff contends that since her prior [complaint] involved allegations that an elected official violated a statute regarding divulging a personnel file, that this alone is sufficient. *This [c]ourt does not believe that this is the law under the First Amendment jurisprudence. As explained above, Plaintiff has failed to bring forth evidence of a genuine issue as to any material fact sufficient to satisfy the first element of a § 1983 First Amendment retaliation claim. Furthermore, North Carolina courts have adopted U.S. Supreme Court jurisprudence when applying North Carolina's constitutional free-speech clause.*

(Emphasis added). Comparing the claims alleged in the complaint with their treatment under each of the orders by Judge Spainhour and Judge Beale, it is apparent that a fundamental issue presented by Defendants' motions before Judges Spainhour and Beale was whether Plaintiff's 2000 complaint touched on a matter of public concern.

This direct comparison also reveals that Judge Beale's order is not merely the application of the different standard required by a motion for summary judgment; rather, Judge Beale's order operates to overrule Judge Spainhour's application and conclusion of law in

ing of a public employee after the exercise of protected speech, but our Court has noted that "a public employee's speech [must] touch on a matter of public concern to invoke the protection of the First Amendment." *Id.* at 479, 574 S.E.2d at 90.

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

Judge Spainhour's ruling on Defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion. Judge Spainhour's order centers on his conclusion that "the 2000 [complaint] raised an issue of public concern, the disclosure to the media of statutorily protected information concerning Plaintiff by an elected Board member who is also a Defendant in this matter." Addressing this line of reasoning, Judge Beale wrote: "This [c]ourt does not believe that this is the law under the First Amendment jurisprudence." Thus, Judge Beale's order was not merely an order granting summary judgment applying a different standard of review as would be appropriate under *Rhue*; rather, Judge Beale's order overruled Judge Spainhour's ruling. Pursuant to *Woolridge* and *Madry*, Judge Beale was without authority to "modify, overrule, or change" Judge Spainhour's conclusion that Plaintiff's 2000 complaint addressed a matter of public concern. *Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194 (quoting *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488).

In *Woolridge*, our Supreme Court addressed a circumstance where one trial judge reconsidered another trial judge's order granting a motion to suppress. *Id.* at 548, 592 S.E.2d at 193. Our Court had ruled that the second trial judge committed no error, and the defendant petitioned the Supreme Court for discretionary review. *Id.* at 549, 592 S.E.2d at 194. The Supreme Court granted review to "determine whether [the second judge] erred in reconsidering [the first judge's] decision to grant [the] defendant's motion to suppress the heroin." *Id.* Holding that the second trial judge was without authority to do so, the Supreme Court wrote the following:

In sum, we conclude that [the first trial judge's] order suppressing the heroin was not subject to reconsideration. Litigants and superior court judges must remain mindful that "[t]he power of one judge of the superior court is equal to and coordinate with that of another[.]"

Woolridge, 357 N.C. at 551, 592 S.E.2d at 195 (citations omitted). The Supreme Court then vacated the second judge's suppression order, as well as the judgments and verdicts against the defendant, and reversed the decision of our Court with instructions to remand to the trial court for further proceedings. *Id.*

We now apply the principles articulated in *Woolridge* and *Madry* to the case before us. Judge Beale's order begins with his assertion that the very conclusion made by Judge Spainhour "is not the law under the First Amendment Jurisprudence." Judge Beale then

ADKINS v. STANLY CNTY. BD. OF EDUC.

[203 N.C. App. 642 (2010)]

reaches a determination contrary to Judge Spainhour, namely, whether the 2000 complaint touched on a matter of public concern. Then, Judge Beale determined that, based on his determination that the 2000 complaint *did not* touch on a matter of public concern, Plaintiff's federal claim and her state claim must fail. Judge Beale then granted Defendants' motion for summary judgment as to all of Plaintiff's claims. It is clear that Judge Beale's order granted summary judgment in favor of Defendants as to both Plaintiff's federal and state claims because of his conclusion regarding the 2000 complaint. We must vacate Judge Beale's order and we do not address the substantive questions which follow from Judge Beale's overruling of Judge Spainhour's order. *Id.*

Because we vacate Judge Beale's order granting summary judgment, that order is a nullity and is "void and of no effect." *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393, 545 S.E.2d 788, 793, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001). Neither party has appealed from Judge Spainhour's ruling on Defendants' motion to dismiss. We note that, because Judge Spainhour's order dismissed some, but not all, of Plaintiff's claims, thereby leaving some issues for trial, that order was an interlocutory order from which there is generally no right of appeal. *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001) ("An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order."). Because neither party has properly appealed, assigned error to, or briefed Judge Spainhour's ruling on Defendants' motion to dismiss, there is nothing before us to address with respect to that order. By vacating Judge Beale's order, we have addressed the order from which appeal was taken. We therefore remand to the trial court for further proceedings.

Vacated and remanded.

Judges STEELMAN and STEPHENS concur.

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

IN THE MATTER OF: K.J.D.

No. COA09-1579

(Filed 4 May 2010)

Child Abuse, Dependency, and Neglect— neglect—grand-mother—effective assistance of counsel

The trial court did not err by adjudicating a minor child neglected under N.C.G.S. § 7B-805 and continuing his placement in the home of the child's maternal grandmother. Respondent mother failed to correct the conditions that led to the removal of the minor child from her care for the prior 16 to 18 months, and the child would be at substantial risk of harm if either parent removed the child from the placement. Further, respondent failed to show she was prejudiced by trial counsel's failure to file a motion to dismiss a second petition as barred by *res judicata* because the motion would have been properly denied.

Appeal by respondent-mother from judgment entered 11 August 2009 by Judge Gary S. Cash in District Court, Buncombe County. Heard in the Court of Appeals 12 April 2010.

Charlotte W. Nallan, for Buncombe County Department of Social Services, for petitioner-appellee.

Michael N. Tousey, for guardian ad litem. Jon W. Myers, for respondent-mother.

STROUD, Judge.

Respondent-mother appeals from a judgment adjudicating her child, K.J.D., ("Kyle")¹ as neglected and continuing the child's placement in the home of the child's maternal grandmother. For the following reasons, we affirm.

On 22 August 2008, the Buncombe County Department of Social Services ("petitioner") filed a juvenile petition ("Petition I") alleging that Kyle was a neglected juvenile in that Kyle did not receive proper care, supervision, or discipline from his parents and lived in an environment injurious to his welfare. Petitioner asked the court to grant guardianship of Kyle to the maternal grandmother and maternal step-

1. We will refer to the minor child K.J.D. by the pseudonym Kyle to protect the child's identity and for ease of reading.

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

grandfather, in whose home the child had been placed in February 2008. On 14 January 2009, the court conducted an evidentiary hearing upon Petition I. On 25 February 2009, the court filed an adjudication judgment in which it dismissed Petition I on the basis that it could not find that Kyle was neglected because petitioner was “unable to present any witnesses” to support the allegations that Kyle was exposed to the domestic violence or usage of illegal drugs by the respondent parents as alleged in the petition; the Court also found that “if this activity happened around the minor child it would have been neglect.” On 5 March 2009, petitioner filed a motion to reopen the hearing or for relief from the judgment. On 19 May 2009, the court filed an order denying petitioner’s motion.

On 14 April 2009, petitioner filed a second petition (“Petition II”) alleging that the child was neglected. On 7 July 2009, the court conducted an evidentiary hearing upon Petition II. On 11 August 2009, the court filed an adjudication judgment. The court’s judgment adjudicating Petition II shows that at the evidentiary hearing on 7 July 2009, the parties stipulated to the following findings of fact:

- a. The Buncombe County Department of Social Services (the Department) first became involved with this minor child on February 4, 2008 due to allegations of domestic violence between the respondent parents, the respondent mother’s assaultive behaviors towards others as well, and the respondent father’s substance abuse problems. The Department found that the case was In Need of Services and transferred the case to In-Home Services on March 8, 2008, with social worker (SW) Mary Thompson. The minor child was placed with the maternal grandparents in a kinship placement on February 4, 2008, and he has continued to remain in this placement.
- b. The Department filed a petition pursuant to that report and that matter was heard in court on January 14, 2009, at which time the parties stipulated that the respondent parents had engaged in domestic violence, that the respondent mother was assaultive to others and had been jailed due to her assaultive behaviors, that the respondent father had a criminal history of trafficking in cocaine, and that both parents had a prior history of drug usage. The respondent parents objected to the language in the petition that alleged that the minor child had possibly been exposed to marijuana while in the respondent father’s home, and the respondent parents argued that there was [sic] no allegations in

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

the petition that the minor child had been present when the parents had engaged in domestic violence. The Department had deleted those allegations from the petition; therefore, those issues were not adjudicated.

c. Based upon the stipulations of the parties, the court found that since there was no evidence that the minor child had been in the presence of his parents when they were engaged in domestic violence, and no evidence based upon the stipulations that the minor child had been exposed to marijuana, the minor child was not a neglected child, and the court dismissed the petition.

d. The Department referred the respondent father to Partnership for a Drug Free NC, and on June 5, 2008 the respondent father went for the assessment and was given an unannounced drug screen that was positive for cocaine and high levels of marijuana. The respondent father was to return on July 24, 2008 to complete the substance abuse assessment and to begin treatment, but the respondent father has never returned, and he has never participated in any substance abuse treatment.

e. The respondent mother began Women-At-Risk on September 2, 2008 for anger management, and she has completed the first phase of 16 weeks, but she has not completed the second phase of 10 weeks. Although the respondent mother has completed part of the anger management program, she has not made any progress in addressing her anger issue.

f. The respondent mother is living with friends, and she does not have independent housing.

g. The respondent mother was in jail from approximately February 4, 2009 until February 23, 2009 for probation violation as the respondent mother was moving around so much that the probation officer could not keep in contact with her and she had failed to pay her fines.

h. The respondent father has never paid any child support for the benefit of the minor child. The respondent mother has paid some child support, but erratically in the past and none since she has been released from Jail on January 23, 2009.

The court also made extensive additional findings of fact, including that respondent-mother, while knowing marijuana was being smoked in the father's residence, left the child in the care of his father while

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

she was incarcerated for violating probation; that the father had failed to complete the substance abuse assessment and treatment required by his plan in order to be reunited with the child; that although the father saw the child in the neighborhood, he visited the child only one time prior to December 2008 and none thereafter; that the father had not paid any child support; that respondent-mother had not maintained stable housing and employment, completed anger management classes, or participated in mental health treatment as required by her plan to be reunified with the child; that respondent-mother was diagnosed with a mental condition identified as intermittent explosive disorder, for which she was not seeking treatment; that respondent-mother would be unable to provide safe care for the child until she addresses her mental health issues; that in June 2009 respondent-mother was involved in a fight with another woman during which respondent-mother was stabbed; that during the eighteen months while the child was with the maternal grandmother, respondent-mother visited the child twice on his birthday but she did not visit him at the most recent Christmas or send gifts to him; that the father did not visit the child on his birthday or Christmas and did not provide the child with any gifts; that both parents had assaulted each other on numerous occasions and the child had been exposed to “escalating verbal confrontations” between the child’s parents; that neither parent had paid any support for the child in 2009; that respondent-mother had a good-paying job until the time of her incarceration and that she was erratically paying support during that time; and that the parents had neglected the child “by their failure to correct the conditions that led to the removal of the minor child from their care for the past 16 to 18 months.”

The trial court also found in the dispositional portion of the order that Kyle “has remained living with his maternal grandmother and step-grandfather, and his uncle . . . who is the son of the maternal grandparents.” The court found that Kyle was “happy and well-adjusted” with the maternal grandparents, and that they were meeting all of his needs. The court found that Kyle is “very bonded to the maternal grandparents and appears to be very comfortable in their home.”

The court concluded that Kyle is a neglected juvenile in that the parents have not provided the child with proper care or supervision. The court continued placement of the child with the maternal grandparents and allowed the parents to have weekly supervised visits with the child. The order also set forth various requirements for the

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

respondent-mother, including completion of parenting classes, securing stable housing and employment, completion of anger management classes, completion of a psychological evaluation and set a date for a permanency planning and review hearing.² Respondent-mother appealed. The child's father did not appeal.

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2009). "A proper review of a trial court's finding of neglect entails a determination of (1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citation and quotation marks omitted).

Respondent-mother contends the court erred by adjudicating the child as neglected. She argues the conclusion of law that the child was neglected is not supported by the findings of fact based upon clear, cogent and convincing evidence. Respondent-mother's brief does not address any assignments of error as to any of the findings of fact, with the exception of Finding No. 35, which will be discussed in detail below. Therefore, all of the findings of fact, with the exception of No. 35, are binding on appeal. *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (holding that respondent's factual assignments of error were abandoned and the trial court's findings of fact were binding on appeal because respondent failed to "specifically argue in her brief that they were unsupported by the evidence").

A neglected juvenile is defined as one who "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or . . . who lives in an environment injurious to the juvenile's welfare . . ." N.C. Gen. Stat. § 7B-101(15) (2009). Respondent-mother disputes the court's conclusion of law that the child does not receive proper care or supervision and that the child lives in an environment injurious to the child's welfare. Although respondent-mother does not dispute the findings of fact as to the lack of care or supervision by either *parent*, she contends that the parents did provide an appropriate *caretaker* for the child by agreeing for the child to reside with the maternal grandparents. Respondent-mother argues that because the child did not reside with

2. The order also contained requirements for the father, which are not included herein as he did not appeal.

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

either parent on the date of the filing of the petition, but was residing with the maternal grandmother who was providing him with proper care and supervision, the conclusion that the child was neglected is not supported by the findings of fact. Thus, according to respondent mother, the issue presented is whether a juvenile may be adjudicated as “neglected” where the child is living with a “caretaker” as defined by N.C. Gen. Stat. § 7B-101(3) pursuant to a kinship agreement which was entered prior to the filing of the petition.

Petitioner contends that respondent-mother’s argument that the child cannot be neglected “since at the time of the filing of the petition the minor child was residing with the maternal grandparents” is misplaced because it “violates settled case law, statutes, and the North Carolina Department of Health and Human Services (NCDHHS) mandates to the county departments of social services . . . to make ‘reasonable efforts to prevent or eliminate the need to take custody of the minor child.’” Petitioner cites NCDHHS’s “family centered” practice of attempting to engage a juvenile’s parents in the placement decision when the juvenile cannot safely remain with a parent; only if no voluntary kinship placement can be made “does the department of social service move for non-secure custody of a child.” Petitioner notes that a “kinship placement is not a legal document. The parents voluntarily agree to allow the child to remain in the care of an appropriate kinship provider; but the parents can void the agreement at any time.” Petitioner also noted that the departments of social services use in-home services to assist the parents in making “necessary changes so the child can be placed back with them safely” and seek to avoid having to file a petition before the court. Petitioner contends that

if a parent can state that a child is not neglected or abused because the child has been in a kinship placement for some period of time prior to the filing of the petition, that would put departments of social services in an untenable position of being required to take custody of all children the Department has determine [sic] to be abused or neglected and to place these children in foster care, rather than allow the children to remain with people they know while the Department works with the parents to correct the conditions that led to the out-of-home placement.

Petitioner also argues that respondent-mother’s position is “contrary to settled case law.” Petitioner cites to several cases in support of its argument that the court may adjudicate the child as neglected

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

based upon a parent's past neglect, where there is a risk of neglect in the future.

The difficulty in this particular case arises because it is an adjudication of neglect pursuant to N.C. Gen. Stat. § 7B-805 and not a termination of parental rights under N.C. Gen. Stat. § 7B-1111 (2009). Most cases addressing the definition of neglect arise in the context of termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), which provides that

The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

The factual situation presented in a termination of parental rights case is normally different from that presented by an adjudication case because in a termination case, the child has usually been removed from the parent's home a substantial period of time before the filing of the petition for termination. An adjudication case normally arises immediately following the child's removal from the parent's home. Thus, "[t]his is an unusual appeal in which this Court is being asked to pass upon the sufficiency of evidence to support findings of . . . neglect at the removal, rather than at the termination, stage." *In re Evans*, 81 N.C. App. 449, 451, 344 S.E.2d 325, 327 (1986). This Court noted in *In re Evans* that

[t]here is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the DSS may obtain temporary custody of a child when there is a *risk of neglect* in the future.

81 N.C. App. at 452, 344 S.E.2d at 327. However, there is no difference in the definition of "neglect" as used in cases addressing termination of parental rights under N.C. Gen. Stat. § 7B-1111 and cases addressing adjudication of neglect under N.C. Gen. Stat. § 7B-805; both use the same definition of neglect, referring to N.C. Gen. Stat. § 7B-101(15). Therefore, we may look to cases arising in either context to determine if "neglect" has been demonstrated in this case.

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

This case resembles those that deal with termination of parental rights based upon neglect in that the child has not lived in a home with a parent for a substantial period of time prior to the filing of the petition. For this reason, our courts have addressed the evidence needed to demonstrate “neglect” of a child who has previously been removed from the parent’s home. A prior adjudication of neglect is not sufficient for termination of parental rights. *In re Brim*, 139 N.C. App. 733, 742, 535 S.E.2d 367, 372 (2000) (citation omitted). The court must look at the circumstances as they currently exist and

take into consideration any evidence of changed conditions in light of the evidence of prior neglect and *the probability of a repetition of neglect*. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.

Id. (citation and quotation marks omitted). Therefore, to apply the same standard in this situation, the court should consider “evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the [adjudication] proceeding*.” (Emphasis added.) See *id.* The need for the court to consider the conditions and the fitness of the parent to provide care at the time of the adjudication is based upon the court’s obligation to consider the best interests of the child. Our Supreme Court has stated that

[o]ur discussion would not be complete unless we re-emphasized the fundamental principle underlying North Carolina’s approach to controversies involving child neglect and custody, to wit, that the best interest of the child is the polar star. The fact that a parent does provide love, affection and concern, although it may be relevant, should not be determinative, in that the court could still find the child to be neglected within the meaning of our neglect and termination statutes. Where the evidence shows that a parent has failed or is unable to adequately provide for his child’s physical and economic needs, whether it be by reason of mental infirmity or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected. In determining whether a child is neglected, the determinative factors are the cir-

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

cumstances and conditions surrounding the child, not the fault or culpability of the parent.

In re Montgomery, 311 N.C. 101, 109, 316 S.E.2d 246, 251-52 (1984).

The need for the court to consider the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent is also reflected in cases in which the child has never resided with the parent. A child may be adjudicated as neglected by a parent even if the child has never resided in the parent's home. *See, e.g., In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999) (holding a newborn infant may be adjudicated as neglected if, based on the facts of the case, "there is a substantial risk of future abuse or neglect"). The court in *In re McLean* noted that in cases where the child has never lived with the parent, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *Id.*

Here, the uncontested findings of fact demonstrate that the child was placed in a kinship placement with the maternal grandmother because of both parents' inability to care for the child. In addition, respondent-mother's problems which made her unable to care for the child have continued ever since that time. The court's findings of fact show that respondent-mother has been and remains unable to adequately provide for her child's physical and economic needs. She has been unable to correct the conditions which led to the child's kinship placement with the maternal grandmother. She continues to engage in assaultive behavior. She has not completed counseling to address her anger issues or sought treatment for her mental disorder. She does not have stable housing and she does not have a job. The trial court found that respondent-mother had failed "to correct the conditions that led to the removal of the minor child from [her] care for the past 16 to 18 months." The Court also found that "the minor child would be at substantial risk of harm if either of his parents removed the child from that placement [with the maternal grandmother.]"³ We conclude these findings support a conclusion that the child is a neglected juvenile. *See* N.C. Gen. Stat. § 7B-101(15).

Respondent-mother's next argument is related to her first. Here, she focuses upon the court's finding of fact No. 35 in the adjudication order whereby the court found:

3. Although this finding is a portion of Finding No. 35, this part of Finding No. 35 was not challenged by respondent, as discussed in detail below.

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

Although the minor child is safely placed with his maternal grandmother, the minor child would be at substantial risk of harm if either of his parents removed the child from that placement. While neither parent has indicated that they would remove the minor child from that placement, pursuant to N.C.G.S. § 7B-100(5) the intent of the Juvenile Code, as well as the Adoption and Safe Families Act of 1997, P.L. 105-89, is that ‘the juvenile will be placed in a safe, **permanent** home within a reasonable amount of time.’ (Emphasis added). The respondent parents have neglected the minor child by their failure to correct the conditions that led to the removal of the minor child from their care for the past 16 to 18 months. (Emphasis in original).

Respondent-mother contends that the court “erred by finding the minor child to be neglected when at the time of the petition’s filing he was in a safe and stable relative placement and when neither N.C. Gen. Stat. § 7B-100(5) nor the Adoption and Safe Families Act of 1997, P.L. 105-89, require court recognition of a safe and stable relative placement.” Respondent-mother argues in her brief that the requirements of the Adoption and Safe Families Act (“ASFA”) and N.C. Gen. Stat. § 7B-100(5) “come into play only after a child is taken into the care of the county department of social services.” She argues the Buncombe County DSS “had no statutory or other obligation to file a second petition in this matter after the child was safely placed with the maternal grandmother.” Respondent-mother further contends that DSS has taken the position that ASFA and N.C. Gen. Stat. § 7B-100(5) “require a county department of social services to ensure that every child is in a permanent living arrangement” but that this position is “an economic and practical fiction.” Thus, respondent-mother challenges the trial court’s conclusion of law contained within Finding No. 35 and the trial court’s reliance on ASFA and the “intent” of the Juvenile Code, but she does not challenge the findings of fact contained within Finding No. 35.

Finding No. 35 is denominated as a finding of fact but it contains both findings of fact and a conclusion of law.

The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, *see Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), or the application of legal principles, *see Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982), is more properly classified a conclusion of law. Any determination reached through ‘logical

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

reasoning from the evidentiary facts' is more properly classified a finding of fact. *Quick*, 305 N.C. at 452, 290 S.E.2d at 657-58 (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951)). The determination of neglect requires the application of the legal principles set forth in N.C. Gen. Stat. § [7B-101(15)] and is therefore a conclusion of law.

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675-76 (1997). We will therefore address the findings of fact and the conclusion of law included within Finding No. 35 separately.

The findings of fact regarding respondent-mother and the child's circumstances contained within Finding No. 35 are:

1. [T]he minor child is safely placed with his maternal grandmother[;]
2. [T]he minor child would be at substantial risk of harm if either of his parents removed the child from that placement[; and]
3. [N]either parent has indicated that they would remove the minor child from that placement[.]

Respondent-mother does not challenge the findings of fact contained within Finding No. 35, so they are binding on appeal. *In re P.M.*, 169 N.C. App. at 424, 610 S.E.2d at 404-05.

Finding No. 35 also includes a conclusion of law, that "[t]he respondent parents have neglected the minor child by their failure to correct the conditions that led to the removal of the minor child from their care for the past 16 to 18 months." Respondent-mother challenges only the trial court's conclusion of law that the child is neglected based upon her failure to correct the conditions that led to removal from her care and the trial court's rationale for this conclusion.

We have already determined above that the uncontested findings of fact support the trial court's conclusion that the child was neglected. The trial court's reference to ASFA and the "intent of the Juvenile Code" in Finding No. 35 was not necessary for its determination that the child was neglected. ASFA does not actually provide any substantive law which applies to the trial court's determination of neglect but sets forth the requirements which departments of social services must meet to receive federal funding for various programs. *See* 42 U.S.C. §§ 670-675 (2009). Thus, the trial court's unnecessary reference to ASFA does not render its conclusion of law erroneous.

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

Likewise, the trial court's reference to the "intent" of the Juvenile Code was not necessary to its conclusion of law as to neglect. *See State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." (citation omitted)). Therefore, we are not persuaded by respondent-mother's contentions.

Respondent-mother lastly contends that her trial counsel rendered ineffective assistance of counsel by failing to raise and argue the defense of *res judicata* at the hearing of Petition II.⁴ "In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2009). "To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so serious as to deprive her of a fair hearing." *In re Bishop*, 92 N.C. App. 662, 665, 375 S.E.2d 676, 679 (1989) (citation omitted).

We conclude that respondent-mother may not sustain her claim.

Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues.

In re I.J., 186 N.C. App. 298, 300, 650 S.E.2d 671, 672 (2007) (citation and quotation marks omitted). Our Supreme Court has noted that "[b]oth the existence of the condition of neglect and its degree are by nature subject to change." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). "Thus, an adjudication that a child was

4. We note that trial counsel apparently considered the issue of *res judicata*, based upon the stipulation entered at the hearing that certain allegations had not been adjudicated at the hearing on Petition I. Specifically, the parties stipulated that "The respondent parents objected to the language in [Petition I] that alleged that the minor child had possibly been exposed to marijuana while in the respondent father's home, and the respondent parents argued that there was [sic] no allegations in the petition that the minor child had been present when the parents had engaged in domestic violence. The Department had deleted those allegations from the petition; therefore, those issues were not adjudicated." However, as respondent-mother argues ineffective assistance of counsel as to *res judicata*, we analyze the issue without reliance upon the stipulation.

IN RE K.J.D.

[203 N.C. App. 653 (2010)]

neglected” at an earlier time “does not bind the trial court” on the issue of neglect at a later time based upon existing conditions at the later time. *Id.* “A new petition, based on circumstances arising subsequent” to the original hearing is considered a new action, and is not “barred by the doctrine of *res judicata*.” *In re S.R.G.*, — N.C. App. —, —, 684 S.E.2d 902, 905 (2009), *disc. review and cert. denied*, 2010 N.C. LEXIS 70 (2010).

In the case at bar, petitioner filed Petition II which alleged additional matters arising subsequent to Petition I. Thus, there is no identity of subject matter. Respondent-mother’s own brief notes that “[p]aragraphs 4 (first), 4 (second), 5 and 6 “contain information about the respondent parents *since* the filing of Petition I. Topics include drug use, anger management, and housing [as well as] . . . uncompleted programs to which Buncombe County referred the parents such as substance abuse assessment, domestic violence, and Women at Risk.” (Emphasis added.) In addition, Petition II contained allegations regarding the parents’ failure to pay child support after the filing of Petition I. Respondent-mother essentially argues that since her anger issues, housing inadequacies, and failure to support the child existed at the time of Petition I and continued to exist at the time of Petition II, that these conditions are not “significant new facts” and should be ignored. However, the uncontested findings of fact regarding respondent’s circumstances and actions after dismissal of Petition I are sufficient to support the trial court’s order, even the facts did show a continuation of a pattern of neglect which started prior to the filing of Petition I. Consequently, even if trial counsel had made a motion to dismiss Petition II as barred by *res judicata*, the motion would have properly been denied. Respondent-mother thus has not demonstrated that she was prejudiced by trial counsel’s failure to file such a motion. We affirm.

AFFIRMED.

Chief Judge MARTIN and Judge JACKSON concur.

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

VICKIE B. LANGWELL, ADMINISTRATOR OF THE ESTATE OF JEFFREY A. LANGWELL,
DECEASED, PLAINTIFF v. ALBEMARLE FAMILY PRACTICE, PLLC; AND TAMELY
TYSON, FNP, DEFENDANTS

No. COA09-891

(Filed 4 May 2010)

Medical Malpractice— motion for a new trial—improperly granted

The trial court abused its discretion in granting plaintiff's motion for a new trial in a medical malpractice action. The trial court's order contained 11 findings of fact pertaining to the evidence presented at trial, only one of which referred to defendants' evidence and which omitted any reference to defendants' expert witness who testified as to the applicable standard of care. Moreover, the trial court did not identify any "unreliable testimony" submitted by defendants.

Appeal by Defendants from order entered 8 December 2008 by Judge Milton F. Fitch, Jr. in Camden County Superior Court. Heard in the Court of Appeals 28 January 2010.

C. Everett Thompson, II and Baker, Jones, Daly & Carter, P.A., by Roswald B. Daly, Jr., for Plaintiff-Appellee.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Jerry A. Allen, Jr. and O. Drew Grice, Jr., for Defendants-Appellants.

STEPHENS, Judge.

I. Procedural History and Factual Background

On Monday, 19 May 2003 at around 9:00 a.m., Jeffrey Langwell presented to Albemarle Family Practice ("Albemarle") as an acute walk-in patient. Mr. Langwell was seen by Tamely Tyson, a family nurse practitioner employed by Albemarle. At that time, Mr. Langwell reported to Nurse Tyson that "earlier in the week he just didn't feel very good, but just kind of blew it off." Then on Friday, he became short of breath and started coughing. He also got dizzy and vomited some. Although he was not dizzy or vomiting on the day he went to Albemarle, he continued to cough. He coughed up some yellowish phlegm, some of which was blood-tinged. He also reported that he had been running a low-grade fever and was having chills.

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

Mr. Langwell denied any chest pain or palpitations, and although he was experiencing mild shortness of breath, he was not having any shortness of breath that was causing respiratory complications. He denied any ear or throat pain. Mr. Langwell had a medical history of diabetes, hypertension, and elevated cholesterol. He also had a history of smoking.

Nurse Tyson performed a physical examination of Mr. Langwell. During the course of the examination, Nurse Tyson determined that Mr. Langwell's blood pressure was low, his heart rate was elevated, although his heart rhythm was regular, and he was perspiring. However, his respiratory rate was within normal limits, his skin was warm, his color was good, and his mental status was normal. When Nurse Tyson listened to Mr. Langwell's lungs, she discovered bilateral rhonchi, which alerted her to the presence of respiratory infection.

Based upon Mr. Langwell's present symptoms and medical history, Nurse Tyson diagnosed him with community acquired pneumonia ("CAP"). Nurse Tyson administered a DuoNeb treatment to dilate Mr. Langwell's bronchial tubes and gave Mr. Langwell an Albuterol inhaler to use as needed when he left the office. She also ordered an intramuscular injection of Rocephin, an antibiotic commonly used to treat CAP. Nurse Tyson prescribed the oral antibiotic Augmentin and the steroid Prednisone, and encouraged Mr. Langwell to drink fluids. Nurse Tyson sent Mr. Langwell to Albemarle Hospital for a chest x-ray to confirm the diagnosis of CAP. Nurse Tyson told Mr. Langwell to come back on Wednesday for a follow-up visit, but advised him to call or return to Albemarle sooner if his condition worsened.

Mr. Langwell went to Albemarle Hospital and had a chest x-ray taken.¹ He then returned home, where he remained on the couch for the remainder of the day before going upstairs to bed. Ms. Langwell checked on her husband periodically and testified that his condition never changed until around 11:00 p.m. At that time, Mr. Langwell experienced increased difficulty breathing and his mental status declined. Although his breathing became labored, Ms. Langwell never saw her husband gasping for air or fighting to breathe.

Ms. Langwell helped her husband into the car and propped him up against one of the rear doors. During the trip to Albemarle Hospital, Ms. Langwell noticed that Mr. Langwell was lying down in the back seat and didn't speak. Ms. Langwell assumed he was sleep-

1. Mr. Langwell's wife, Vickie Langwell, testified that someone called their home on that day to confirm Mr. Langwell's diagnosis of CAP.

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

ing. Upon arrival at the hospital, Mr. Langwell had no pulse, and was pronounced dead shortly thereafter.

An autopsy revealed that very few pneumococcus bacteria, which cause CAP, were present which indicated that the administration of Rocephin and Augmentin had been successful. Additionally, there was no indication of hypoxic injury or end-organ damage consistent with respiratory death. The autopsy also revealed that Mr. Langwell's three main coronary arteries were 80-90% stenosed, which indicated significant coronary artery disease. Pneumonia was listed as the cause of death on Mr. Langwell's death certificate.

Ms. Langwell ("Plaintiff"), the administratrix of her deceased husband's estate, filed suit against Albemarle and Nurse Tyson (collectively, "Defendants") on 22 June 2004 alleging medical negligence in that Nurse Tyson's care and treatment of Mr. Langwell was not in accordance with the applicable standard of care. The case was tried during the 19 May 2008 session of Camden County Superior Court, Judge Milton F. Fitch, Jr. presiding. The jury returned a verdict in favor of Defendants, and judgment was entered on 17 June 2008.

Following the verdict, Plaintiff moved for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure for the following reasons:

- a. Manifest disregard by the jury of the instructions of the court.
- b. The jury's verdict appears to have been given under the influence of prejudice or other grounds not pertaining to the evidence.
- c. The verdict was contrary to the overwhelming evidence of [D]efendants' negligence.
- d. The [P]laintiff should have a new trial in the interest of justice.

On 15 September 2008, a hearing was held on Plaintiff's motion. At the hearing, Plaintiff based the motion for new trial "upon the jury's verdict being against the weight of the evidence and due to some prejudicial [sic] or passion on the part of the jury." When asked by the trial court to elaborate, the following exchange took place between Plaintiff's counsel and the court:

MR. THOMPSON: I don't mean prejudice in the normal sense but I think—

THE COURT: I understand that. I still just want to explore that.

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

MR. THOMPSON: It just seems to me that the verdict of the jury was a shock to me based on the evidence that was presented, maybe a shock to the [c]ourt too. I don't know.

After hearing arguments from both parties, Judge Fitch announced, "[In] the [c]ourt's discretion the motion for a new trial is allowed." When Defendants requested that Judge Fitch specify the grounds for the granting of the new trial, Judge Fitch responded, "The reason for the granting of the motion for new trial is in the [c]ourt's discretion[.]"

On 16 September 2008, Defendants requested specific findings of fact and conclusions of law pursuant to Rule 52 of the North Carolina Rules of Civil Procedure. In response, Plaintiff drafted a proposed order with findings of fact and conclusions of law and submitted it to Judge Fitch for consideration. Defendants objected to the proposed order, arguing that the findings of fact were inaccurate, incomplete, and did not reflect the evidence admitted at trial. Specifically, Defendants objected to the omission of findings of fact regarding the testimony of expert witness Julee Waldrop, a certified family nurse practitioner, who testified that Nurse Tyson met the standard of care in treating Mr. Langwell. Defendants submitted a revised proposed order to Judge Fitch and Plaintiff on 1 December 2008. Judge Fitch rejected Defendants' revisions and entered the order drafted by Plaintiff's counsel on 8 December 2008.

From the trial court's order granting Plaintiff's motion for a new trial, Defendants appeal.

II. Discussion

By Defendants' sole assignment of error, Defendants contend that the trial court erred in granting Plaintiff's motion for a new trial. We agree.

Pursuant to Rule 59(a)(7) of the North Carolina Rules of Civil Procedure, a judge may grant a new trial if there is insufficient evidence to justify the verdict or if the verdict is contrary to law. N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) (2007). The Supreme Court of North Carolina has stated that " 'insufficiency of the evidence to justify the verdict' " indicates that the verdict " 'was against the greater weight of the evidence.' " *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979).

A motion for a new trial pursuant to Rule 59 is generally addressed to the sound discretion of the trial court. *Harrell v.*

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

Sagebrush of N.C., LLC, 191 N.C. App. 381, 384, 663 S.E.2d 444, 446 (2008). Appellate review of the trial court's ruling on a Rule 59 motion "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E.2d at 604. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605; *accord Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997).

A plaintiff in a medical malpractice action has the burden of proving the applicable standard of care, a breach of the standard of care, that the plaintiff's injuries were caused by the alleged breach, and the nature and amount of damages stemming from the injuries. *Weaver v. Sheppa*, 186 N.C. App. 412, 415, 651 S.E.2d 395, 398 (2007), *aff'd*, 362 N.C. 341, 661 S.E.2d 733 (2008). Because the issues involved in a medical malpractice action are typically beyond the general knowledge of a lay person, a plaintiff must "demonstrate by the testimony of a qualified expert that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the community and that defendant's treatment proximately caused the injury." *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978); *see also Lord v. Beerman*, 191 N.C. App. 290, 293-94, 664 S.E.2d 331, 334 (2008). "In malpractice cases[,] the applicable standard of care must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar and competent to testify to that limited field of practice." *Lowery v. Newton*, 52 N.C. App. 234, 239, 278 S.E.2d 566, 571, *disc. review denied*, 303 N.C. 711, *reconsideration denied*, 304 N.C. 195, 291 S.E.2d 148 (1981); *see also Harris v. Miller*, 335 N.C. 379, 399, 438 S.E.2d 731, 742 (1994).

It is well settled that "[i]t is the jury's function to weigh the evidence and to determine the credibility of witnesses." *Hollifield*, 345 N.C. at 483, 480 S.E.2d at 664. The plaintiff in a medical malpractice action will not prevail

unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (2007). “The jury’s function as trier of fact must be given the utmost consideration and deference before a jury’s decision is to be set aside.” *Di Frega v. Pugliese*, 164 N.C. App. 499, 510, 596 S.E.2d 456, 464 (2004) (citations and quotation marks omitted).

In this case, Defendants tendered Nurse Waldrop as an expert family nurse practitioner. Plaintiff objected, and the trial court excused the jury “for the purposes of voir dire of this particular witness as to her ability to testify as an expert.” After voir dire, the trial court overruled Plaintiff’s objection and “accept[ed] Ms. Waldrop as an expert in the field of family nurse practitioner.” Nurse Waldrop testified as follows:

In Nurse Waldrop’s expert opinion, the care Nurse Tyson provided to Mr. Langwell “met or exceeded the standard of care” that applied to her. Nurse Waldrop explained that Mr. Langwell’s symptoms, which began three days before he came to Albemarle and included some shortness of breath, coughing, dizziness, vomiting, coughing up yellowish phlegm (some of which was blood-tinged), a low-grade fever, and chills, were all “potentially symptoms of respiratory infection.” She noted that Mr. Langwell denied having any chest pain or palpitations, or any pain or difficulty breathing, and appeared alert and oriented during Nurse Tyson’s physical examination of him. When Nurse Tyson listened to Mr. Langwell’s chest, she heard coarse rhonchi in the upper and lower lobes of the lungs, which meant that she heard a “kind of rough sound.” Nurse Waldrop listened to his heart and evaluated the rest of his respiratory tract, all of which appeared to be fine. While performing the examination, Nurse Tyson noted that Mr. Langwell was wet, sweaty, and warm.

Nurse Waldrop testified that Mr. Langwell’s signs and symptoms were not consistent with shock of any kind, tissue perfusion, respiratory distress or failure, septicemia, septic shock, electrolyte imbalance, or hyperglycemia. Defense counsel asked Nurse Waldrop, “Based upon the way that Mr. Langwell presented with his signs and symptoms, was [CAP] a reasonable diagnosis in your opinion for [Nurse Tyson] to make as a [Family Nurse Practitioner]?” Nurse Waldrop responded, “Yes.” Nurse Waldrop further clarified

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

that “it [was] a reasonable diagnosis for any health care provider to make[.]”

Nurse Waldrop further testified that the standard of care did not require that Mr. Langwell be admitted to the hospital upon his presentation to Albemarle. Nurse Tyson ordered an intramuscular injection of an appropriate antibiotic and prescribed additional oral antibiotics to be taken at home. Nurse Waldrop testified that, given Mr. Langwell’s clinical status, Nurse Tyson’s orders and clinical treatment were appropriate.

Defendants tendered Dr. Ricky Watson as an expert in the field of family medicine, and Dr. Watson was accepted by the court, without objection, as an expert witness. Dr. Watson testified that, in his expert opinion, Nurse Tyson’s care and treatment of Mr. Langwell met or exceeded the applicable standard of care; Nurse Tyson exercised her best judgment based upon Mr. Langwell’s presentation to her; and Nurse Tyson used reasonable care and diligence in the application of her skills and knowledge to the treatment of Mr. Langwell. Dr. Watson further opined that although Mr. Langwell did have pneumonia at the time of his death, the cause of Mr. Langwell’s death was “cardiac arrhythmia.”

Defendants also tendered Dr. Kerry Willis as an expert in the field of family practice medicine, and the trial court accepted Dr. Willis as an expert witness without objection. Dr. Willis testified that because Mr. Langwell was not experiencing respiratory distress at the time of his visit to Albemarle, Nurse Tyson’s treatment was entirely appropriate. In fact, Dr. Willis characterized Nurse Tyson’s treatment as aggressive in that she ordered an injection of antibiotics when a prescription of oral antibiotics would have been sufficient. Dr. Willis also testified that the standard of care did not require Nurse Tyson to admit Mr. Langwell to the hospital.

Dr. Willis agreed with Dr. Watson’s assessment that Mr. Langwell did not die from pneumonia. According to the autopsy findings, Mr. Langwell had severe, three vessel coronary artery disease. Mr. Langwell was also diabetic. Based on these risk factors, along with the lack of damage to other organ systems, Dr. Willis opined that the likely cause of Mr. Langwell’s death was cardiac arrhythmia.

The written order granting Plaintiff a new trial contains 11 findings of fact pertaining to the evidence presented at trial. While ten of those findings recite selected facts in the light most beneficial to

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

Plaintiff's position, only one finding refers to Defendants' evidence. This finding states:

Defendants offered the testimony of Tamely Tyson and also the expert opinion of Dr. Ricky Lee Watson and Dr. Kerry A. Willis, both of whom were board certified in family practice. Defendants' experts testified that, in their opinion, Tamely Tyson did not breach the standard of care in sending Jeffrey Langwell home and not sending him to the emergency room, and further they opined that Jeffrey Langwell did not die from pneumonia but died as a result of cardiac arrest.

This sole finding of fact concerning Defendants' evidence omits any reference to Nurse Waldrop and her testimony. At issue in this case is the alleged negligence of Nurse Tyson, a family nurse practitioner. Thus, two of the essential issues to be determined are the standard of care applicable to a family nurse practitioner and whether Nurse Tyson breached that standard of care. Nurse Waldrop was accepted by the trial court "as an expert in the field of family nurse practitioner." Accordingly, as a practitioner in the particular field that Nurse Tyson practiced in, Nurse Waldrop was qualified to render her expert opinion on the standard of care applicable to Nurse Tyson and whether Nurse Tyson breached that standard. *Newton*, 52 N.C. App. at 239, 278 S.E.2d at 571.

While the order fails to mention Nurse Waldrop's testimony, the order contains the following finding of fact regarding Plaintiff's expert witness:

Plaintiff also offered the testimony of Cheryl Clark, a family nurse practitioner, who also opined that the family nurse practitioner, Tamely Tyson, breached the standard of care by not sending Jeffrey Langwell to the emergency room at Albemarle Hospital.

Nurse Waldrop's testimony was directly contrary to Cheryl Clark's testimony as to whether Nurse Tyson had met the applicable standard of care in her treatment of Mr. Langwell. Neither the qualifications of either family nurse practitioner nor the substance of their testimony has been assigned as error on appeal. Although neglecting to mention a witness's testimony in the court's findings of fact is not an abuse of discretion *per se*, by omitting any reference to Nurse Waldrop's critical expert testimony, the order on its face reveals that the trial court failed to consider all the competent and relevant evidence presented at trial.

LANGWELL v. ALBEMARLE FAMILY PRACTICE, PLLC

[203 N.C. App. 666 (2010)]

The order also contains the following finding of fact:

It is the opinion of the Court and in the Court's discretion that the jury has been misled by unreliable testimony on the part of the defense and that in the opinion of the Court and its discretion a jury has returned an erroneous verdict.

However, the trial judge does not identify any unreliable testimony submitted by Defendants. Furthermore, Plaintiff did not object to any testimony at trial on the basis of unreliability. Moreover, Plaintiff did not argue in her motion for a new trial that any testimony was unreliable and does not argue on appeal that any specific defense testimony was unreliable. Indeed, had Defendants' expert witnesses offered unreliable testimony, that evidence would have been inadmissible. However, Plaintiff's objection to Nurse Waldrop's qualification as an expert witness was overruled, and Plaintiff did not argue in her motion for a new trial and does not argue on appeal to this Court that the trial court erred in overruling her objection. Furthermore, Plaintiff did not object to the qualification of Defendants' remaining expert witnesses as competent experts in their fields, and Plaintiff did not argue in her motion before the trial court or on appeal to this Court that those witnesses were incompetent to testify to their opinions. For these reasons, we find no support for the trial court's Rule 59 order in its "finding" that the jury was "misled" by "unreliable testimony on the part of the defense[.]"

Accordingly, we are "reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Bynum*, 305 N.C. at 487, 290 S.E.2d at 605.

For the reasons stated, the order setting aside the verdict and awarding Plaintiff a new trial is reversed, the verdict is reinstated, and this cause is remanded to the superior court for entry of judgment in accordance with the verdict returned by the jury.

REVERSED and REMANDED.

Judges CALABRIA and GEER concur.

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

STATE OF NORTH CAROLINA v. ANDREW WILLIAM JARRETT

No. COA09-1036

(Filed 4 May 2010)

**Motor Vehicles— driving while impaired—driver’s license
checkpoint—motion to suppress evidence—reasonable
articulable suspicion**

The trial court did not err in a driving while impaired case by denying defendant’s motion to suppress evidence obtained from his car during a driver’s license checkpoint. The primary programmatic purpose of the checkpoint was lawful and reasonable. Under the totality of circumstances, the officer had reasonable articulable suspicion to detain defendant regarding the contents of an aluminum can after it was determined to contain an alcoholic beverage.

Appeal by defendant from order entered 17 February 2009 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 11 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Sebastian Kielmanovich, for the State.

William L. Gardo, II, for defendant-appellant.

CALABRIA, Judge.

Andrew William Jarrett (“defendant”) appeals the trial court’s order denying his motion to suppress evidence. We affirm.

I. Background

During the evening of 28 March 2008, the Forsyth County Sheriff’s Department (“Sheriff’s Department”) conducted a stationary driver’s license checkpoint (“the checkpoint”) at the intersection of Styers Ferry Road and Dull Road in Forsyth County, North Carolina. The checkpoint was conducted pursuant to a written Sheriff’s Department policy. Six officers with flashlights, two in each lane of traffic, stopped every car coming through the checkpoint to determine if the drivers possessed a valid driver’s license and vehicle registration. Corporal Barry Sales was present at the checkpoint and supervised the officers. All officers at the checkpoint wore uniforms and traffic vests. Additionally, the Sheriff’s Department vehicles at the checkpoint had activated their blue lights.

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

At approximately 11:16 p.m., defendant, accompanied by a passenger, approached the checkpoint driving his 1990 Honda Accord (“the Accord”). As Deputy T.L. McMasters (“Deputy McMasters”) approached the driver’s side of the Accord to request defendant’s license and registration, he noticed an aluminum can located between the driver’s seat and the passenger’s seat. The can was open and a light liquid residue was evident on the top of the can. Deputy McMasters then observed the passenger leaning over toward defendant. It appeared to Deputy McMasters that the passenger was trying to conceal the can from view.

Defendant provided Deputy McMasters with a valid license and registration. The license indicated that defendant was eighteen years old. Before returning defendant’s documentation, Deputy McMasters asked the occupants of the Accord, “What is in the can?” Neither defendant nor the passenger answered the question. When Deputy McMasters asked again, the passenger responded by raising the can, revealing that it was a Busch Ice beer.

Deputy McMasters directed defendant to drive the Accord to a nearby Citgo gas station parking lot. Deputy McMasters then told defendant to exit the Accord. Upon exiting, defendant admitted he had been drinking. Deputy McMasters then performed a series of field sobriety tests, which defendant failed. As a result, defendant was arrested and charged with driving while impaired (“DWI”) and driving by a person less than twenty-one years old after consuming alcohol.

On 25 June 2008, in Forsyth County District Court, defendant filed a motion to suppress the evidence obtained at the checkpoint. After the trial court denied the motion, defendant pled guilty to both charges. Defendant then timely filed a notice of appeal for his DWI conviction to superior court.¹

On 22 January 2009, defendant filed another motion to suppress the evidence obtained at the checkpoint, this time in Forsyth County Superior Court. On 6 February 2009, a suppression hearing was held. Deputy McMasters was the only witness to testify at the suppression hearing. On 17 February 2009, the trial court denied defendant’s motion to suppress. Defendant then pled guilty to DWI on 6 April 2009, but reserved his right to appeal the denial of the motion to suppress. Defendant was sentenced to sixty days in the Forsyth County Jail. The active sentence was suspended and defendant was placed on supervised probation for twelve months. Defendant appeals.

1. The district court arrested judgment on the conviction for driving by a person less than twenty-one years old after consuming alcohol.

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

II. Standard of Review

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. "When reviewing a motion to suppress evidence, this Court determines whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law. If supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even if conflicting evidence was also introduced. However, conclusions of law regarding admissibility are reviewed de novo." *State v. Wilkerson*, 363 N.C. 382, 433-34, 683 S.E.2d 174, 205 (2009) (internal citations omitted).

III. Constitutionality of the Checkpoint

Defendant argues that the trial court erred by concluding that the checkpoint did not violate defendant's Fourth Amendment rights. We disagree.

" '[P]olice officers effectuate a seizure when they stop a vehicle at a checkpoint.' As with all seizures, checkpoints conform with the Fourth Amendment only 'if they are reasonable.' " *State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339 (2005) (quoting *State v. Mitchell*, 358 N.C. 63, 66, 592 S.E.2d 543, 545 (2004)). Thus, "police may briefly detain vehicles at a roadblock checkpoint without individualized suspicion, so long as the purpose of the checkpoint is legitimate and the checkpoint itself is reasonable." *State v. Veazey*, 191 N.C. App. 181, 184, 662 S.E.2d 683, 686 (2008) (citations omitted).

When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. . . . Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint . . . [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.

Id. at 185-86, 662 S.E.2d at 686-87 (internal quotations and citations omitted).

A. Primary programmatic purpose

"In considering the constitutionality of a checkpoint, the trial court must initially 'examine the available evidence to determine the purpose of the checkpoint program.' " *State v. Gabriel*, 192 N.C. App.

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

517, 521, 665 S.E.2d 581, 585 (2008) (quoting *Rose*, 170 N.C. App. at 289, 612 S.E.2d at 339).

Our Court has previously held that where there is no evidence in the record to contradict the State's proffered purpose for a checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose. However, where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose. In such cases, the trial court may not simply accept the State's invocation of a proper purpose, but instead must carr[y] out a close review of the scheme at issue. This type of searching inquiry is necessary to ensure that an illegal multi-purpose checkpoint [is not] made legal by the simple device of assigning the primary purpose to one objective instead of the other[.]

Veazey, 191 N.C. App. at 187, 662 S.E.2d at 687-88 (internal quotations and citations omitted). "[W]hen a trooper's testimony varies concerning the primary purpose of the checkpoint, the trial court is 'required to make findings regarding the actual primary purpose of the checkpoint and . . . to reach a conclusion regarding whether this purpose was lawful.'" *Gabriel*, 192 N.C. App. at 521, 665 S.E.2d at 585 (quoting *Veazey*, 191 N.C. App. at 190, 662 S.E.2d at 689).

In the instant case, Deputy McMasters testified that the purpose of the checkpoint was to "[c]heck the license and registration of every car coming through the checkpoint." However, on cross-examination, Deputy McMasters also admitted that officers at the checkpoint were looking for "evidence that's in plain view of other crimes" and "[a]ny sign of a criminal activity." Additionally, Deputy McMasters testified that the location of the checkpoint was chosen in part because drivers in that area who "don't have a license or . . . [ha]ve been drinking or . . . want to get somewhere quickly and speed . . ." would be likely to be traveling in the area of the checkpoint. Because variations existed in Deputy McMasters' testimony regarding the primary purpose of the checkpoint, the trial court was required to make findings regarding the actual primary purpose of the checkpoint.

In the order denying defendant's motion to suppress, the trial court found as fact, supported by Deputy McMasters' testimony, that the checkpoint was conducted according to a policy promulgated by the Sheriff's Department. Specifically, the trial court found that, in

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

order to comply with the policy, (1) a supervising officer was present; (2) all cars coming through the checkpoint were stopped; and (3) the blue lights were activated on all Sheriff's Department vehicles. As a result of these findings, the trial court concluded that "the primary purpose of the checkpoint was to determine if drivers were complying with the driver's license laws of North Carolina and to deter citizens from violating these said laws."

"The United States Supreme Court has previously suggested that checking for drivers' license and vehicle registration violations is a lawful primary purpose for a checkpoint. North Carolina Courts have also upheld checkpoints designed to uncover drivers' license and vehicle registration violations." *Veazey*, 191 N.C. App. at 189, 662 S.E.2d at 689 (citations omitted). Therefore, the primary programmatic purpose of the checkpoint, as determined by the trial court, was a lawful one.

B. Reasonableness

Although the trial court concluded that the checkpoint had a lawful primary purpose, "its inquiry does not end with that finding." *Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342. Instead, the trial court must still determine "whether the checkpoint itself was reasonable." *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 689-90.

"To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest." *Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342. In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 361, 99 S. Ct. 2637, 2640 (1979). *Id.* at 293, 612 S.E.2d at 342. Under *Brown*, the trial court must consider "[1] the gravity of the public concerns served by the seizure[;] [2] the degree to which the seizure advances the public interest[;] and [3] the severity of the interference with individual liberty." *Id.* at 293-94, 612 S.E.2d at 342 (internal quotations and citation omitted).

i The gravity of the public concerns

"The first *Brown* factor—the gravity of the public concerns served by the seizure—analyzes the importance of the purpose of the checkpoint. This factor is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public." *Id.* at 294, 612 S.E.2d at 342. As previ-

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

ously noted, the trial court determined that the primary purpose of the checkpoint was to uncover and deter driver's license violations. The trial court then concluded that "the deterrence goal was a reasonable one."

Both the United States Supreme Court as well as our Courts have suggested that license and registration checkpoints advance an important purpose. The United States Supreme Court has also noted that states have a vital interest in ensuring compliance with other types of motor vehicle laws that promote public safety on the roads.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690 (internal quotations and citations omitted). Therefore, the checkpoint adequately satisfied the requirements of the first prong of *Brown*.

ii. The degree to which the seizure advanced public interests

Under the second *Brown* prong—the degree to which the seizure advanced public interests—the trial court was required to determine “whether ‘[t]he police appropriately tailored their checkpoint stops’ to fit their primary purpose.” *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (quoting *Illinois v. Lidster*, 540 U.S. 419, 427, 157 L. Ed. 2d 843, 852, 124 S. Ct. 885, 891 (2004)).

Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Id.

In the instant case, the trial court's order found as fact, supported by Deputy McMasters' testimony, that the checkpoint "is conducted 'every Friday and Saturday nights,' " and that "[t]hese checkpoints did result in charges for license violations as well as DWI arrests." Additionally, the trial court found that the checkpoint operated for a period of time between one and one-half to two hours. While these findings do not necessarily address all of the non-exclusive factors suggested by *Veazey*, they do indicate that the trial court considered

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

appropriate factors to determine whether the checkpoint was sufficiently tailored to fit its primary purpose, satisfying the second *Brown* prong.

iii. The severity of the interference with individual liberty

The final *Brown* factor to be considered is the severity of the interference with individual liberty. “[C]ourts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint’s objectives.” *Veazey*, 191 N.C. App. at 192, 662 S.E.2d at 690-91.

Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint’s potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers’ authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint[.]

Id. at 193, 662 S.E.2d at 691. “Our Court has held that these and other factors are not “lynchpin[s],” but instead [are] circumstance[s] to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint.” *Id.* (quoting *Rose*, 170 N.C. App. at 298, 612 S.E.2d at 345).

In the instant case, the trial court’s findings, which were supported by Deputy McMasters’ testimony, indicate that it considered some of the relevant factors under the third *Brown* prong. These findings included: (1) “the Sheriff cars had to have their blue lights on;” (2) “[t]he deputies were wearing the uniforms . . . [and] had a visibility of about 200 feet;” (3) “[a]ll cars that came through the license checkpoint from both directions were being stopped;” (4) “[a] supervisor of the Sheriff’s Department had to be present on the scene of the license checkpoint;” and (5) “[t]his driver’s license checkpoint was established and conducted pursuant to a written Predetermined Forsyth County Sheriff’s Office Policy.” These findings indicate the

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

trial court adequately considered the appropriate factors under the third prong of *Brown*.

The trial court's order denying defendant's motion to suppress contained adequate findings of fact, supported by competent evidence, to satisfy the three prongs of the *Brown* test. These findings in turn support the trial court's conclusions of law that "the license check was not an unreasonable detention and therefore was valid under the Fourth Amendment" and "said checkpoint was not unreasonably restrictive on the citizens." The trial court correctly determined that the Sheriff's Department had a legitimate primary programmatic purpose for conducting a checkpoint and that the checkpoint was reasonable under the circumstances. This assignment of error is overruled.

IV. Constitutionality of the Extended Seizure

Defendant argues that, even if the checkpoint was constitutional, the trial court erred in denying the motion to suppress because Deputy McMasters lacked reasonable, articulable suspicion to detain defendant after a valid license and registration was produced. We disagree.

The United States Supreme Court has held that "police officers [may] act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose." *City of Indianapolis v. Edmond*, 531 U.S. 32, 48, 148 L. Ed. 2d 333, 347, 121 S. Ct. 447, 457 (2000). However,

[o]nce the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual. Where no grounds for a reasonable and articulable suspicion exist and where the encounter has not become consensual, a detainee's extended seizure is unconstitutional.

State v. Jackson, — N.C. App. —, —, 681 S.E.2d 492, 496 (2009) (internal citation omitted).

In the instant case, the primary purpose of the checkpoint was "to determine if drivers were complying with the driver's license laws of North Carolina. . . ." Therefore, the primary purpose of the stop was addressed when defendant produced a valid North Carolina driver's

STATE v. JARRETT

[203 N.C. App. 675 (2010)]

license and registration for Deputy McMasters. Accordingly, further delay of defendant by Deputy McMasters could only be constitutionally justified if either Deputy McMasters had formed reasonable and articulable suspicion that a crime was being committed or defendant consented to questioning. The State and defendant agree that no consent was given, but disagree as to whether Deputy McMasters possessed reasonable and articulable suspicion to justify further detention of defendant.

[W]hen an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries. [T]he police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion.

State v. Foreman, 351 N.C. 627, 630, 527 S.E.2d 921, 923 (2000) (internal quotations and citations omitted). “The reasonable and articulable suspicion standard requires that the court examine both the articulable facts known to the officers at the time they determined to approach and investigate the activities of [defendant], and the rational inferences which the officers were entitled to draw from those facts.” *State v. Butler*, 147 N.C. App. 1, 7, 556 S.E.2d 304, 308 (2001) (internal quotations and citation omitted). “To determine whether the officer had reasonable suspicion, it is necessary to look at the totality of the circumstances.” *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754, *aff’d per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).

In the instant case, the trial court’s findings indicate that when Deputy McMasters, who had seven years of law enforcement experience, approached the Accord, he saw an aluminum can located between the driver’s seat and the passenger’s seat. Additionally, Deputy McMasters witnessed the passenger leaning over toward defendant in an attempt to conceal the can. Based on these observations, Deputy McMasters twice asked the occupants of the Accord, “What is in the can?” At that point, the passenger raised the can, revealing that it was a Busch Ice beer. Deputy McMasters then ordered defendant, whom he knew to be eighteen years old, to drive to the parking lot near the Citgo station. After exiting the Accord, defendant admitted he had consumed alcohol.

We hold, under the totality of the circumstances, that Deputy McMasters possessed reasonable and articulable suspicion that criminal activity was afoot to further delay defendant by questioning him

STATE v. LITTLE

[203 N.C. App. 684 (2010)]

and his passenger about the contents of the aluminum can. While it is true, as defendant suggests, that the can could have contained any liquid, alcoholic or otherwise, Deputy McMasters only made a reasonable inquiry in order to determine the actual contents of the can. Once it was determined that the can was an alcoholic beverage, Deputy McMasters was justified in ordering defendant aside to conduct further inquiries. When, in response to these inquiries, defendant admitted he had been drinking, Deputy McMasters was justified in placing him under arrest. This assignment of error is overruled.

V. Conclusion

The trial court's findings of fact were based upon competent evidence and supported the conclusion of law that the checkpoint, conducted by the Sheriff's Department on 28 March 2008, did not violate defendant's Fourth Amendment rights. Further, the trial court's findings fully supported its conclusion of law that Deputy McMasters possessed reasonable and articulable suspicion to further delay, question and ultimately arrest defendant.

Affirmed.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. ARTHUR DEVON LITTLE

No. COA09-1223

(Filed 4 May 2010)

1. Confessions and Incriminating Statements—interrogation not custodial—inside police station—officer's unarticulated intent

The trial court correctly ruled that a first-degree murder defendant was not in custody and was not entitled to *Miranda* warnings when he gave inculpatory statements to police. Defendant was brought into the secure area of the police station; although there was an officer outside the open door and another taking notes in an adjacent room, defendant was not aware of these facts.

STATE v. LITTLE

[203 N.C. App. 684 (2010)]

2. Constitutional Law— right to counsel—interrogation room—request not custodial

Although a first-degree murder defendant was not in custody, the Court of Appeals ruled as a guide to the trial courts that defendant did not unambiguously ask for an attorney.

Appeal by defendant from order entered 12 February 2009 by Judge Kenneth F. Crow in Craven County Superior Court. Heard in the Court of Appeals 24 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Richard E. Jester for defendant-appellant.

BRYANT, Judge.

Defendant Arthur Devon Little was tried for first-degree murder at the 15 February 2009 Criminal Session of the Superior Court, Craven County. Prior to trial, on 12 February 2009, the trial court denied defendant's motion to suppress his statement to police. On 27 February 2009, the jury returned a verdict of guilty, and the trial court sentenced defendant to life in prison without the possibility of parole. Defendant appeals. For the reasons discussed herein, we affirm.

Facts

The evidence tended to show the following. Defendant and the victim, Anthony Terail Jones, had a volatile relationship. In the fall of 2005, defendant planned to sell crack cocaine to Jones, but Jones pulled a gun on defendant and stole the drugs instead. Defendant also believed Jones had broken into his home, and defendant's longtime girlfriend, Anne Marie Santos, testified that Jones was one of two men who had robbed her at gunpoint. On 13 June 2006, defendant took another one of his girlfriends to the U.S. Cellular in New Bern and waited in the car while she went inside. Jones and his girlfriend were at the same store purchasing a phone. When defendant recognized Jones' car in the parking lot, defendant called his brother and a friend to come over and beat up Jones. The two men arrived at the store and waited outside; defendant remained in his car. As Jones and his girlfriend left the store, Jones saw defendant's brother and friend and ran away from them towards defendant's car. Defendant shot Jones several times and then drove away from the scene. Defendant testified that he shot Jones in a panic. Jones died from multiple gunshot wounds.

STATE v. LITTLE

[203 N.C. App. 684 (2010)]

After driving around and learning from family members that his brother had been arrested, defendant went to the New Bern police department to turn himself in. Defendant was met in the lobby by Deputy Matt Heckman, who knew defendant. Deputy Heckman patted defendant down and placed him in a report writing room with an open door. Deputy Heckman then left the room and asked another officer to “keep an eye on him.” Deputy Heckman offered defendant pizza, which defendant accepted. Detective Paul Brown then arrived and asked defendant to step into an interview room upstairs. Detective Brown assured defendant he was not under arrest and then interviewed defendant about the events at the U.S. Cellular store. Another detective observed the interview from an adjoining room and took notes. When the interview touched on Jones’ shooting, defendant asked if he needed an attorney. Detective Brown replied “I don’t know, I can’t answer that for you, are you asking for one?” Defendant did not reply to this question and continued talking with the detective. At one point, defendant said he was leaving but did not, and instead, continued the interview. Defendant eventually admitted shooting Jones and gave the detective details about the crime. When Detective Brown asked defendant to write out a statement, defendant asked for an attorney and the interview ended. Defendant moved to suppress his statement to Detective Brown, which motion the trial court denied. Defendant appeals. As discussed below, we affirm.

Defendant made one hundred and eleven assignments of error, but presents only a single argument in his brief to this Court. His argument is that the trial court erred in denying his motion to suppress his statement to the police. We affirm.

Standard of Review

Defendant contends that the trial court erred in denying his motion to suppress. We disagree.

On appeal, our

“review of a trial court’s denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court’s findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court’s conclusions of law.” *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (citation omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). “[I]f so, the trial court’s conclusions

STATE v. LITTLE

[203 N.C. App. 684 (2010)]

of law are binding on appeal.” *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995).

State v. Veazey, — N.C. App. —, — S.E.2d —, — (2009). Where a defendant fails to challenge the findings of fact in an order denying a motion to suppress, this Court’s review is “limited to whether the trial court’s findings of fact support its conclusions of law.” *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

Here, the trial court’s order denying defendant’s motion contains one hundred and seventeen findings of fact and eighteen conclusions of law. In his assignments of error, defendant challenges findings 6-8, 11-15, 19-20, 26-30, 33-35, 37-47, 49, 52-54, 56-117, and all eighteen conclusions. However, in his brief defendant does not challenge any specific findings of fact as unsupported by competent evidence. Thus, all of the trial court’s findings of fact are conclusive on appeal. *Id.* Instead, defendant quotes findings 18, 21-22, 32, 47-53, 55 and 99 in his brief with approval, asserting that “[t]hese findings more clearly support the Conclusion of Law that [defendant] was in custody when he made all of his statements to Detective Brown.” Defendant also argues that finding 58 does not support a conclusion that he did not request an attorney. We therefore review the trial court’s order to determine whether the findings of fact support conclusions 2-7 which relate to whether defendant (I) was in custody and (II) requested an attorney during the interview.

I

[1] Defendant argues that the trial court erred in denying his motion to suppress, contending that he was in custody when questioned by police and, thus, was entitled to be advised of his *Miranda* rights. We disagree.

Statements obtained as a result of custodial interrogation when a defendant has not been advised of his constitutional rights are inadmissible. *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). The appellate courts of this State have

consistently held that the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation. *See, e.g., State v. Phipps*, 331 N.C. 427, 442, 418 S.E.2d 178, 185 (1992). . . . Custodial interrogation “‘means questioning initiated by law enforcement officers after a person has been taken into custody

STATE v. LITTLE

[203 N.C. App. 684 (2010)]

or otherwise deprived of his freedom of action in any significant way.’ ” *Phipps*, 331 N.C. at 441, 418 S.E.2d at 185 (quoting *Miranda*, 384 U.S. 436 at 444, 16 L. Ed. 2d 694 at 706). . . .

The United States Supreme Court has held that in determining whether a suspect was in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293, 114 S. Ct. 1526 (1994) (*per curiam*). The United States Supreme Court has recognized that any interview of a suspect by a police officer will have coercive aspects to it. *Oregon v. Mathiason*, 429 U.S. 492, 50 L. Ed. 2d 714, 97 S. Ct. 711 (1977) (*per curiam*). However, the United States Supreme Court has also recognized that *Miranda* warnings are not required “simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.” *Id.* at 495, 50 L. Ed. 2d at 719.

State v. Gaines, 345 N.C. 647, 661-62, 483 S.E.2d 396, 404-05, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). Defendant cites *State v. Hicks* for the proposition that the test for determining whether he was in custody for *Miranda* purposes is “ ‘whether a reasonable person in his position would feel free to leave’ or would feel ‘compelled to stay.’ ” 333 N.C. 467, 478, 428 S.E.2d 167, 173 (1993) (quoting *State v. Torres*, 330 N.C. 517, 525, 412 S.E.2d 20, 24 (1992)). However, our Supreme Court has rejected the “free to leave” test for *Miranda* purposes and specifically overruled *Hicks* and *Torres* to the extent they appear to endorse that test. *State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001). Instead, the ultimate inquiry on appellate review is whether there were indicia of formal arrest. *Id.*

The uncontested findings show the following. Defendant voluntarily drove to the police station approximately six hours after the shooting. There was no warrant for defendant’s arrest nor had the police attempted to contact him or request his presence for an interview. Deputy Heckman, who knew defendant, met him in the public lobby and invited defendant into the secure area of the station. The secure area of the station required a passkey for entry, but anyone could leave the secure area to exit the building without any type of key. Deputy Heckman took defendant into a “report writing room”, patted him down for weapons and told him that an investigator wanted to speak with him. Defendant did not object to the frisk, and

STATE v. LITTLE

[203 N.C. App. 684 (2010)]

Deputy Heckman never mentioned the shooting or asked defendant any questions about it. The door to the room remained open while defendant waited. Deputy Heckman never told defendant he was under arrest or could not leave, never handcuffed him, and never spoke to him in an intimidating manner.

Detective Brown met defendant approximately twenty to thirty minutes after defendant's arrival at the station. He introduced himself to defendant and told him he was not under arrest and was free to leave. Detective Brown then suggested to defendant that they speak upstairs where it was quieter. At the station elevator, Detective Brown again told defendant he was not under arrest and was free to leave. Defendant voluntarily accompanied Detective Brown and another officer upstairs. When they entered the upstairs interview room, Detective Brown told defendant once again that he was not under arrest and was free to leave. Unbeknownst to defendant, the other officer entered an adjacent room and took notes on the interview. Detective Brown then began to question defendant about his actions during the day and about the shooting. At one point defendant stood up and said "I'm trying to leave, I didn't do it." Detective Brown did not restrain defendant who then sat back down and continued talking. About sixty to ninety minutes into the interview, defendant made numerous inculpatory statements about the shooting. The interview continued until defendant was asked to write out a statement at which point he refused and requested an attorney. Detective Brown immediately ended the interview.

Defendant contends that "[b]ringing someone inside the secure area of the police station indicates some level of custody" but cites no authority for this proposition. However, "*Miranda* warnings are not required 'simply because the questioning takes place in the station house[.]'" *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405 (quoting *Mathiason*, 429 U.S. at 495, 50 L. Ed. 2d at 719).

Defendant next asserts that Deputy Heckman acted as a guard in standing outside the open door of the report writing room while awaiting Detective Brown's arrival and in asking another officer to watch defendant so he would not leave while Deputy Heckman was getting defendant some pizza. Defendant also cites the presence of the note-taking officer in the room adjacent to the interview room as a circumstance indicating the defendant was in custody. The trial court did find that Deputy Heckman stayed in the hallway to keep defendant from leaving but also found that defendant was unaware of the officer's intentions and was unaware that Deputy Heckman had

STATE v. LITTLE

[203 N.C. App. 684 (2010)]

asked another officer to watch him. Likewise, the trial court found that defendant was not aware of the officer who took notes during the interview. “ ‘A policeman’s unarticulated plan has no bearing on the question whether a suspect was “in custody” at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.’ ” *Buchanan*, 353 N.C. at 341-42, 543 S.E.2d at 829 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 336 (1984)). The presence of the note-taking officer and Deputy Heckman’s unarticulated determination not to let defendant leave have no bearing on whether defendant was in custody since defendant was unaware of these facts.

The trial court’s findings of fact support its conclusions that defendant was not in custody and was not entitled to *Miranda* warnings. We overrule defendant’s assignments of error on this point.

II

[2] Defendant next argues that the trial court erred in denying his motion to suppress, contending that he invoked his right to counsel prior to making inculpatory statements. We disagree.

Once a suspect invokes his right to counsel during a custodial interrogation, “all questioning must cease until an attorney is present or the suspect initiates further communication with the police.” *State v. Dix*, 194 N.C. App. 151, 155, 669 S.E.2d 25, 28 (2008) (citing *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 386 (1981)), *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 140 (2009). A suspect must “at a minimum, [make] some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney” *McNeil v. Wisconsin*, 501 U.S. 171, 178, 115 L. Ed. 2d 158, 169 (1991). “However, [i]f the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.” *Dix*, 194 N.C. App. at 155, 669 S.E.2d at 28 (quoting *Davis v. United States*, 512 U.S. 452, 461-62, 129 L. Ed. 2d 362, 373 (1994)). In *dicta*, the *Davis* Court suggested that “when a suspect makes an ambiguous statement it will often be good police practice for the interviewing officer[] to clarify whether or not he actually wants an attorney.” *Davis*, 512 U.S. at 461, 129 L. Ed. 2d at 373.

Here, the trial court found:

(58) The Defendant then asked Brown, “Do you want to know if I shot him?” Brown said, “Did you?” The Defendant said, “Do I

STATE v. LITTLE

[203 N.C. App. 684 (2010)]

need an attorney?" and Brown replied, "I don't know, I can't answer that for you, are you asking for one?"

(59) The Defendant's response was, "I know a guy got shot at the U.S. Cellular by some guy named Troy." The Defendant did not respond to Brown's question regarding the Defendant's wishes regarding an attorney nor did he allude to an attorney again until the end of the interview. The Defendant did not try to leave.

Defendant argues that he made a sufficiently unambiguous request for counsel to halt questioning and contends this exchange was similar to that in *Torres*. Defendant also cites *Torres* for the proposition that in custodial situations, "when faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the person's true intent." 330 N.C. at 529, 412 S.E.2d at 27.

We first note that, as discussed above, defendant was not in custody at the time of the interview and, thus, there was no custodial interrogation. Therefore, defendant was not entitled to the protections of *Miranda* and its progeny. However, out of an abundance of caution and as a guide to our trial courts, we address this portion of defendant's argument as well.

Torres, the only case cited by defendant on this point, was decided prior to *Davis*. This Court has since held that "*Davis* [] imposes the burden of resolving any ambiguity as to whether a suspect wishes to invoke his right to counsel upon the individual, rather than leaving the question up to the interrogating officer." *Dix*, 194 N.C. App. at 157, 669 S.E.2d at 29. "[C]larifying questions [by the interviewing officer] are not required." *Id.* at 156, 669 S.E.2d at 28. In *Dix*, the defendant stated "I'm probably gonna [sic] have to have a lawyer." *Id.* The interviewing officer then responded, "It's up to you if you wanna [sic] answer questions or not. I mean, you can answer till you don't feel comfortable, whatever and then not answer. Ya [sic] know, that's totally up to you. I know earlier you said you was [sic] wanting to talk to me because" *Id.* at 158, 669 S.E.2d at 29. We held that "the trial court's assumption that [the interviewing officer] was required to ask clarifying questions, and its subsequent conclusion that it was required to resolve any ambiguity in the defendant's favor were error." *Id.*

Here, defendant did not unambiguously ask for an attorney; rather, he asked Detective Brown's opinion about the matter. Although not required to do so, Detective Brown asked the clarifying

PAY TEL COMM'NS, INC. v. CALDWELL CNTY.

[203 N.C. App. 692 (2010)]

question “are you asking for one?” Defendant failed to respond and instead continued telling the detective about the shooting. Thus, Detective Brown went beyond what is required under State and federal case law. The trial court’s findings fully support its conclusions that defendant did not unambiguously ask for an attorney. Defendant’s assignments of error on this issue are overruled.

Affirmed.

Judges STEELMAN and BEASLEY concur.

PAY TEL COMMUNICATIONS, INC., PLAINTIFF v. CALDWELL COUNTY AND SHERIFF
OF CALDWELL COUNTY, DEFENDANTS

No. COA09-935

(Filed 4 May 2010)

1. Venue— motion to change—properly granted

The trial court did not err in granting defendant’s motion for a change of venue from Wake County to Caldwell County because defendants were public officers and the cause of action arose in Caldwell County. Moreover, consent to conduct arbitration proceedings in Wake County did not constitute consent to that venue for any judicial proceedings.

2. Appeal and Error— issue not preserved for appellate review—trial court did not rule on motion

Defendant’s argument that the trial court erred by failing to grant plaintiff’s motion to compel arbitration was not properly before the Court of Appeals where the trial court did not address plaintiff’s motion to compel arbitration.

Appeal by plaintiff from order entered 16 April 2009 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 28 January 2010.

Tuggle Duggins & Meschan, P.A., by Kenneth J. Gumbiner and Martha R. Sacrinty, for plaintiff-appellant.

Wilson, Lackey & Rohr, P.C., by David S. Lackey, for defendant-appellees.

PAY TEL COMM'NS, INC. v. CALDWELL CNTY.

[203 N.C. App. 692 (2010)]

CALABRIA, Judge.

Pay Tel Communications, Inc. ("plaintiff") appeals an order granting the change of venue motion of Caldwell County ("the County") and Sheriff Alan C. Jones, the Sheriff of Caldwell County ("Sheriff Jones") (collectively "defendants"). We affirm.

I. Background

Plaintiff is a North Carolina corporation that provides inmate telecommunications equipment and services. Plaintiff first entered into an agreement with defendants to provide the Caldwell County Jail with inmate telephone services in May 1990. Under the agreement, plaintiff was designated as the exclusive provider of inmate telephone services for a period of five years, until May 1995. In November 1994, the parties extended their agreement for an additional five year period, until May 2000. In August 1999, then Caldwell County Sheriff Roger L. Hutchings ("Sheriff Hutchings") executed an agreement with plaintiff to extend inmate telephone services in the Caldwell County Jail until 17 May 2005 ("the 1999 extension"). Sheriff Hutchings signed the 1999 extension directly beneath the party headings "Caldwell County" and "Sheriff of Caldwell County." Additionally, the line below Sheriff Hutchings' signature identified him as the "Authorized Agent for Sheriff and County." However, the County denies that Sheriff Hutchings had the authority to act as their agent.

In September 2003, the parties purported to enter into an addendum to the 1999 extension ("the Addendum"), which further extended the contract until 17 May 2009. Captain George Marley ("Capt. Marley"), a deputy sheriff, signed the Addendum, which identified Capt. Marley as an "Authorized Agent for [the] County." Both Sheriff Jones and the County deny that Capt. Marley was authorized to act as their respective agents.

In a letter dated 16 January 2008, Captain C.A. Brackett, Detention Administrator for the Caldwell County Jail, informed plaintiff that "the Caldwell County Sheriff's Office/Detention Center wishes to terminate any and all services." Plaintiff's attorney subsequently sent Sheriff Jones correspondence on multiple occasions advising Sheriff Jones that this cancellation constituted a breach of the 1999 extension and the Addendum.

The 1999 extension included a dispute resolution clause that required the parties to submit any dispute involving the 1999 exten-

PAY TEL COMM'NS, INC. v. CALDWELL CNTY.

[203 N.C. App. 692 (2010)]

sion to binding arbitration (“the arbitration clause”). Specifically, the arbitration clause provided:

Any and all claims or disputes arising out of or relating to this Agreement or the breach thereof shall be decided by binding arbitration in accordance with the rules governing arbitration of the Private Adjudication Center, an adjunct to the Duke University School of Law. Venue for such arbitration shall be Raleigh, North Carolina unless otherwise agreed by the parties. At the conclusion of this arbitration, the award may be confirmed by order of any court having jurisdiction over the parties.

The Private Adjudication Center mentioned in the arbitration clause subsequently ceased to operate.

On 8 December 2008, plaintiff filed an “Application for Appointment of Arbitrator” (“the Application”) in Wake County Superior Court, in order to initiate arbitration proceedings. In response, defendants filed a motion for change of venue and answer to the Application on 12 January 2009. Defendants argued that the 1999 extension and the Addendum were invalid because they were not executed by authorized agents and that, as a result, they were not bound by these contracts. Defendants requested transferring the case to Caldwell County Superior Court for a determination of the validity of the 1999 extension and the Addendum.

Plaintiff then filed a motion to compel arbitration on 22 January 2009. Both parties submitted written arguments to the trial court on the motion to change venue, and plaintiff additionally submitted written arguments on its motion to compel arbitration. After a hearing on the matters, on 16 April 2009, the trial court granted defendants’ motion to change venue. The trial court’s order was limited to the motion to change venue and did not address plaintiff’s motion to compel arbitration. Plaintiff appeals.

II. Venue

[1] As an initial matter, we note that the trial court’s order granting defendants’ motion to change venue is an interlocutory order, and thus, not generally subject to appellate review. “However, grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable.” *Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990). We therefore consider the merits of plaintiff’s venue claim.

PAY TEL COMM'NS, INC. v. CALDWELL CNTY.

[203 N.C. App. 692 (2010)]

Plaintiff argues that the trial court erred by granting defendants' motion for change of venue. We disagree.

Because of the dissolution of the Private Adjudication Center, the method of selecting an arbitrator under the terms of the 1999 extension failed. As a result, plaintiff filed the Application to facilitate the appointment of an arbitrator under the default provision of the North Carolina Uniform Arbitration Act ("NCUAA"), which was in effect at the time the 1999 extension was executed.¹ This provision stated:

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

N.C. Gen. Stat. § 1-567.4 (2002). Additionally, the NCUAA contains a provision explaining the treatment of an application:

Except as otherwise provided, an application to the court under this Article shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

N.C. Gen. Stat. § 1-567.16 (2002). The record on appeal indicates that defendants were each served by a civil summons.

"Venue is a procedural matter, and . . . the General Assembly has the constitutional authority to establish rules of procedure for the Superior Court Division." *Stephenson v. Bartlett*, 358 N.C. 219, 228, 595 S.E.2d 112, 118 (2004). "When reviewing a decision on a motion to transfer venue, the reviewing court must look to the allegations of the plaintiff's complaint." *Ford v. Paddock*, — N.C. App. —, —, 674 S.E.2d 689, 691 (2009) (citations omitted).

Under the terms of N.C. Gen. Stat. § 1-567.16, an application under the NCUAA initiates proceedings in the superior court, similar

1. The NCUAA has since been repealed and replaced by the Revised NCUAA, which applies to all agreements to arbitrate made on or after 1 January 2004. See 2003 N.C. Sess. Laws 345.

PAY TEL COMM'NS, INC. v. CALDWELL CNTY.

[203 N.C. App. 692 (2010)]

to a civil complaint. In the instant case, the Application filed by plaintiff names both Caldwell County and the Sheriff of Caldwell County as opposing parties. The Application alleged that defendants executed both the 1999 extension and, subsequently, the Addendum. Plaintiff further alleged that a dispute had arisen between the parties over the 1999 extension and the Addendum.

The NCUAA does not contain a venue provision.² The trial court determined that a change of venue was appropriate pursuant to N.C. Gen. Stat. § 1-77(2), which states:

Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

...

(2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

N.C. Gen. Stat. § 1-77(2) (2009). The purpose of this provision is to prevent public officials from being “‘required to forsake their civic duties and attend the courts of a distant forum.’” *Coats v. Hospital*, 264 N.C. 332, 333, 141 S.E.2d 490, 491 (1965) (quoting *McIntosh*, North Carolina Practice and Procedure § 284 (1st Ed. 1929)). In order to determine whether this provision applies, the following two questions must be addressed: “(1) Is defendant a ‘public officer or person especially appointed to execute his duties’? [and] (2) In what county did the cause of action in suit arise?” *Id.*

Plaintiff concedes that defendants are public officers and that the cause of action, the alleged breach of the 1999 extension and the Addendum, occurred in Caldwell County. However, plaintiff contends that the Application was not an “action” against a public officer under N.C. Gen. Stat. § 1-77(2).

A civil action is defined by statute as “an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a

2. The Uniform Arbitration Act, promulgated by the National Conference of Commissioners on Uniform State Laws, did contain a venue provision. *See* Unif. Arbitration Act 1956 § 18. However, this provision was not adopted as part of the NCUAA.

PAY TEL COMM'NS, INC. v. CALDWELL CNTY.

[203 N.C. App. 692 (2010)]

wrong, or the punishment or prevention of a public offense.” N.C. Gen. Stat. § 1-2 (2009). In the instant case, plaintiff filed the Application seeking an order by the trial court to enforce its right to have an arbitrator appointed under the default provision of the NCUAA. Additionally, the NCUAA makes clear that “notice of an initial application for an order shall be served in the manner provided by law for the service of a summons *in an action*.” N.C. Gen. Stat. § 1-567.16 (2002) (emphasis added). Thus, we conclude that the trial court properly treated the Application as an “action” against a public official for the purposes of N.C. Gen. Stat. § 1-77(2).

However, plaintiff argues that even if the Application constituted an “action,” defendants waived their right to transfer venue under the terms of the 1999 extension. “Venue not being jurisdictional may be waived by any party, including the government.” *Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 744, 71 S.E.2d 54, 56 (1952) (citations omitted). Waiver occurs when any action is filed in an improper county and there is not a timely demand that the trial be removed to the proper county. *Id.*

Plaintiff contends that the following portion of the 1999 extension constituted a waiver of venue by defendants: “Venue for such arbitration shall be Raleigh, North Carolina unless otherwise agreed by the parties.” “An arbitration is an extrajudicial proceeding[.]” *Cotton Mills v. Textile Workers Union*, 238 N.C. 719, 721, 79 S.E.2d 181, 183 (1953). Consent to conduct the extrajudicial proceeding of arbitration in Wake County cannot be construed to also constitute consent to venue for any judicial proceedings that may involve issues associated with the arbitration.

Under the explicit language of the 1999 extension, defendants consented to conduct *arbitration* only in Wake County. Plaintiff has provided no evidence that defendants waived their right to venue pursuant to N.C. Gen. Stat. § 1-77(2). To the contrary, the record in the instant case clearly indicates that defendants filed a motion to change venue contemporaneously with their answer to the Application. This filing was sufficiently timely to preserve defendants’ right to contest venue. Plaintiff’s assignment of error is overruled.

III. Motion to Compel Arbitration

[2] Plaintiff argues that the trial court erred by failing to grant plaintiff’s motion to compel arbitration. This issue is not properly before this Court. Plaintiff is correct that “‘an order denying arbitration is immediately appealable because it involves a substantial right. . . .’”

STATE v. BRENNAN

[203 N.C. App. 698 (2010)]

Pressler v. Duke Univ., — N.C. App. —, —, 685 S.E.2d 6, 9 (2009) (quoting *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999)). However, although a motion to compel arbitration was filed by plaintiff, there is no order denying arbitration in the instant case. Plaintiff appealed from the trial court’s “Order Granting Defendants’ Motion For Change of Venue.” This order regarding venue did not address, in any way, plaintiff’s motion to compel arbitration.

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.*

N.C.R. App. P. 10(b)(1) (2008) (emphasis added). The trial court must rule on plaintiff’s motion to compel arbitration before the right to appellate review is established. This assignment of error is overruled.

IV. Conclusion

Because defendants are public officers and this cause of action arose in Caldwell County, the trial court properly granted defendants’ motion for change of venue to Caldwell County pursuant to N.C. Gen. Stat. § 1-77(2) (2009).

Affirmed.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. THOMAS LEE BRENNAN

No. COA09-1362

(Filed 4 May 2010)

1. Appeal and Error— preservation of issues—constitutional issue not raised at trial—plain error not raised in brief—considered under Rule 2

A Confrontation Clause argument against the admission of expert testimony from a forensic chemist who relied upon reports from an absent chemist was reviewed for plain error under

STATE v. BRENNAN

[203 N.C. App. 698 (2010)]

Rule 2 of the Appellate Rules of Procedure even though defendant had not objected to the evidence on constitutional grounds at trial and did not mention plain error in his brief.

2. Constitutional Law—right to confront witnesses—forensic chemists—reporting lab results of others

The trial court erred by admitting testimony that material seized from defendant was cocaine where the testimony was given by a SBI forensic chemist based on the reports of another chemist who performed the tests. It is obvious from the testimony that the witness was merely reporting the results of other experts.

Appeal by defendant from judgment entered 16 April 2009 by Judge James U. Downs in Superior Court, Swain County. Heard in the Court of Appeals 8 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Barry H. Bloch, for the State.

Jon W. Myers, for defendant-appellant.

WYNN, Judge.

“The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence [such as a forensic analysis] unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant.”¹ In the present case, the State sought to introduce evidence identifying a purported controlled substance through the testimony of a witness who had read the affidavit of the chemical analyst. Because this procedure violated Defendant’s right to confront the witnesses against him, we now reverse the judgment of the trial court.

This appeal arises from the arrest and conviction of Defendant on charges of felony possession of a Schedule II controlled substance, possession of drug paraphernalia, and attaining habitual felon status. Following a consensual search of Defendant’s vehicle, a law enforcement officer found a small cigarette box that contained a pipe which appeared to have residue of a controlled substance. Another law enforcement officer put the cigarette box containing the pipe in a plastic bag, sealed it, completed a State Bureau of Investigation (“SBI”) form, packaged the items for mailing, and sent the package to the SBI Western Regional Laboratory for testing.

1. *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009).

STATE v. BRENNAN

[203 N.C. App. 698 (2010)]

At trial, SBI Agent Misty Icard testified regarding what was done with the items that were received. Upon the State's motion, the trial court received Agent Icard as an expert in the field of forensic chemistry.

Agent Icard testified that Agent Lori Knott was the chemist who analyzed the evidence received from the Swain County Sheriff's Department. Agent Icard testified that Agent Knott had transferred to the SBI Triad Laboratory in Greensboro and was not in court for the trial because she was sick. Agent Icard testified that she reviewed the results of the tests performed by Agent Knott and formed an opinion to a reasonable degree of scientific certainty that the substance found in the pipe was cocaine base, a Schedule II controlled substance. A jury found Defendant guilty of felony possession of a Schedule II controlled substance, possession of drug paraphernalia, and attaining habitual felon status.

[1] On appeal, Defendant argues that under the recently decided United States Supreme Court cases of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the admission of Agent Icard's testimony regarding Agent Knott's chemical tests violated his Sixth Amendment constitutional right to confront witnesses against him. Preliminarily, however, we must address the State's observation that Defendant failed to raise any constitutional objections to Agent Icard's testimony at trial. Defendant's objections at trial were allegations that Agent Icard's testimony was inadmissible hearsay.

This Court recently addressed a similar issue in *State v. Mobley*, — N.C. App. —, 684 S.E.2d 508 (2009):

We note that, at trial, defendant only raised an objection to this testimony on hearsay grounds and did not raise the constitutional question. "It is well established that appellate courts will not ordinarily pass on a constitutional question unless the question was raised in and passed upon by the trial court." *State v. Muncy*, 79 N.C. App. 356, 364, 339 S.E.2d 466, 471, *disc. review denied*, 316 N.C. 736, 345 S.E.2d 396 (1986). However, the North Carolina Rules of Appellate Procedure allow review for "plain error" in criminal cases even where the error is not preserved "where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4) (2009) (amended Oct. 1, 2009).

Id. at —, 684 S.E.2d at 510.

STATE v. BRENNAN

[203 N.C. App. 698 (2010)]

Additionally, the Court in *Mobley* noted that although defendant had mentioned plain error in his brief, he had not adequately argued plain error. *Id.* at —, 684 S.E.2d at 510. “Defendant has thus abandoned his claim of plain error and not properly preserved this issue for review.” *Id.* at —, 684 S.E.2d at 510.

In the present case, Defendant has not even mentioned the plain error standard. Consequently, as in *Mobley*, “[t]he only remaining avenue open for review of defendant’s claim is review under Rule 2 of the North Carolina Rules of Appellate Procedure.” *Id.* at —, 684 S.E.2d at 510. In that regard, *Mobley* concluded that this claimed constitutional error is of such magnitude that review under Rule 2 may be appropriate. “[Rule 2] has been exercised on several occasions to review issues of constitutional importance. We conclude that this is an appropriate circumstance in which to exercise this discretionary review.” *Id.* at —, 684 S.E.2d at 510 (citations omitted). *Mobley* specified, however, that the appropriate standard of review was the plain error standard rather than the constitutional error standard. *Id.* at —, 684 S.E.2d at 510. Accordingly, following the precedent of *Mobley*, we review Defendant’s conviction for plain error pursuant to Rule 2 “to determine whether the alleged error was such that it amounted to a fundamental miscarriage of justice or had a probable impact on the jury’s verdict.” *Id.* at —, 684 S.E.2d at 510.

[2] In *Melendez-Diaz* the United States Supreme Court refined the *Crawford* analysis of whether affidavits could stand in place of expert witness testimony. “[S]worn certificates from analysts affirming that the substance tested was cocaine were determined to be testimonial. Therefore, the analysts must be available for cross-examination by the defendant, or the evidence would be inadmissible absent a showing of unavailability and a prior opportunity by the defendant to cross-examine the analysts.” *Id.* at —, 684 S.E.2d at 510-11.

Two North Carolina cases that have considered the impact of *Melendez-Diaz* are *State v. Locklear* and *State v. Mobley*. “The Court in *Locklear* held that testimony from John Butts, the Chief Medical Examiner of North Carolina, concerning the results of an autopsy and identification of the remains of Cynthia Wheeler, an alleged prior victim, performed by non-testifying experts violated the Confrontation Clause.” *Mobley*, — N.C. App. at —, 684 S.E.2d at 511. This was because “Dr. Butts was merely reporting the results of other experts. He did not testify to his own expert opinion based upon the tests performed by other experts, nor did he testify to any review of the con-

STATE v. BRENNAN

[203 N.C. App. 698 (2010)]

clusions of the underlying reports or of any independent comparison performed.”² *Id.* at —, 684 S.E.2d at 511.

By contrast, *Mobley* held the testimony in that case was distinguishable. “Well-settled North Carolina case law allows an expert to testify to his or her own conclusions based on the testing of others in the field.” *Id.* at —, 684 S.E.2d at 511. (citing *State v. Delaney*, 171 N.C. App. 141, 144, 613 S.E.2d 699, 701 (2005)). In *Mobley*, “the testifying expert . . . testified not just to the results of other experts’ tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts’ tests, and her own expert opinion based on a comparison of the original data.” *Id.* at —, 684 S.E.2d at 511. We must therefore determine, in this case, whether Agent Icard was merely reporting the results of other experts or was testifying to her own technical review of the tests and her expert opinion of the accuracy of the tests.

At trial, Agent Icard was accepted as an expert in the field of forensic chemistry. She testified that the laboratory in which she works has standard operating procedures and she proceeded to explain what that procedure would be in the case of a substance suspected to be a Schedule II controlled substance. With regard to the identification of the substance, Agent Icard testified that her opinion to a reasonable degree of scientific certainty was that the substance was cocaine base which is a Schedule II controlled substance.

On cross examination, however, Agent Icard testified:

Q: You didn’t watch Ms. Knott do any of these tests?

A: No, that’s not what reviewing a case is about. Reviewing a case is to take their data, their notes and to look at it and say yes I agree with their conclusion.

. . . .

Q: Did you ever have a chance before today to examine this material that you’ve got in front of you? I’m talking about the substance itself?

A: No.

Q: So this is the first time you’ve seen this?

A: Yes.

2. The Court in *Locklear* went on to find that the constitutional violation was harmless beyond a reasonable doubt. *Locklear*, 363 N.C. at 453, 681 S.E.2d at 305.

STATE v. BRENNAN

[203 N.C. App. 698 (2010)]

Q: And you're testifying today that your opinion is that it's a Schedule 2 Controlled Substance?

A: Yes, from reviewing her data I can say that that is a controlled substance—Schedule 2 Controlled Substance, cocaine base.

Q: But you're relying on someone else's data to make that opinion, aren't you?

A: I'm relying on data that was generated from this case.

Q: But you didn't generate that data yourself, did you?

A: No.

Q: And you're relying on someone else's data to form that opinion, correct?

A: Correct.

It is obvious from the above-excerpted testimony that Agent Icard was merely reporting the results of other experts. We cannot conclude from this, as this Court did in *Mobley*, that “the underlying report, which would be testimonial on its own, is used as a basis for the opinion of an expert who independently reviewed and confirmed the results, and is therefore not offered for the proof of the matter asserted under North Carolina case law.” *Id.* at —, 684 S.E.2d at 512. On the contrary, as Agent Icard explained on cross-examination, her “review” consisted entirely of testifying in accordance with what the underlying report indicated. Although there is some indication that Agent Knott was unavailable due to illness, there is no indication in the record of any prior opportunity by Defendant to cross-examine Agent Knott.

Agent Icard did no independent research to confirm Agent Knott's results; in fact, she saw the substance for the first time in open court when she testified to what—in her expert opinion—it was. Such expertise is manifestly no more reliable than lay opinion based on a visual inspection of suspected powder cocaine, such as has been deemed inadmissible. *See State v. Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86 (2008) (Steelman, J., dissenting), *rev'd for reasons stated in the dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009) (per curiam). Insofar as Agent Icard testified to Agent Knott's results, the testimony violated Defendant's constitutional rights as interpreted in *Melendez-Diaz* and *Locklear*.

Moreover, it does not appear that the State could have carried its burden of establishing Defendant's guilt of possessing a controlled

STATE v. HAGER

[203 N.C. App. 704 (2010)]

substance without Agent Icard's inadmissible identification of the controlled substance. *See id.* The State asks this Court to indulge in a "reasonable inference" from Ms. Brennan's confession to having smoked crack cocaine earlier in the day, and Defendant's request that Trooper Ammons throw the cigarette box away, that the substance was in fact cocaine base. Such an inference would inevitably corrode a defendant's Sixth Amendment right to confront his accusers.

The admission of Agent Icard's recitation of Agent Knott's report impermissibly violated Defendant's right to confront witnesses against him. The error was prejudicial insofar as it had a probable impact on the jury's verdict. Defendant is therefore entitled to a

New trial.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. JODY LEE HAGER, DEFENDANT

No. COA09-664

(Filed 4 May 2010)

1. Evidence— prior crimes or bad acts—fatal variance with indictment—not shown

The trial court did not err by allowing a larceny victim to testify about other bad behavior by defendant during their relationship. Although defendant argued the testimony constituted evidence of other crimes that created a variance with the indictment, defendant failed to explain why the variance was fatal.

2. Larceny— intent to permanently deprive—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss larceny for insufficient evidence where defendant contended that the victim was not truthful when she testified that jewelry was taken from her home without permission, but pointed to no evidence contrary to the victim's testimony. The fact that defendant pawned these items and had redeemed other pawned items in the past only showed that he did not intend to deprive himself of the property permanently.

STATE v. HAGER

[203 N.C. App. 704 (2010)]

3. Sentencing— lengthy sentence—force not used in crime—delay in reporting

There was no plain error in sentencing defendant where his argument was essentially that the sentence seems too long, not that the term was incorrect under the statutory guidelines, or that defendant should not have been classified as a habitual felon. A lack of force in the commission of the crimes and the delay of the victim reporting the crimes did not rise to the level of grievous error outlined in *State v. Todd*, 313 N.C. 110.

4. Indictment and Information— habitual felon—date of one offense corrected

The trial court did not err by allowing the State to alter an indictment for being an habitual felon after the close of the evidence where the bill listed the date of one of the offenses incorrectly. Defendant did not argue that the typographical error in some way misled or surprised him.

5. Appeal and Error— appealability—error in calculating sentence

Defendant's argument that there was plain error in calculating his sentence was reviewed on appeal despite the fact that plain error analysis applies only to evidentiary rulings and jury instruction errors. An incorrect finding of a prior record level is appealable by N.C.G.S. § 15A-1442(5b)(a) even in the absence of an objection at trial.

6. Sentencing— prior record level—use of prior convictions

There was no error in calculating defendant's prior record level where defendant's arguments did not specify which of several dozen prior convictions he believes were not fully proven or were counted twice. Furthermore, defendant expressly stipulated his prior record level in an extended colloquy and the question of which convictions were used for which purpose was considered at that hearing.

7. Larceny— possession of stolen goods—consolidation of judgments

The trial court erred by entering judgment against defendant for both larceny and possession of stolen goods. Although the trial court consolidated the judgments for sentencing, it has been specifically held that consolidation does not cure the error.

STATE v. HAGER

[203 N.C. App. 704 (2010)]

Appeal by defendant from judgment entered 1 March 2005 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 28 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for defendant.

ELMORE, Judge.

Jody Lee Hager (defendant) was found guilty of one count of felony larceny, one count of felony possession of stolen goods, one count of non-felony larceny, and one count of non-felony possession of stolen goods. After being found guilty of being a habitual felon, defendant was sentenced to a term of imprisonment of 107 to 138 months; he now appeals.

Defendant was involved romantically with Tammi Eckard off and on from October 2001 through April 2003. In December 2003, Ms. Eckard was in a pawn shop and saw for sale a tennis bracelet that belonged to her; until then, she had believed the bracelet was in a drawer with other jewelry she did not wear on a daily basis. Ms. Eckard reported the incident to the sheriff's department, then checked the contents of the drawer for her other jewelry; at that time, she realized a diamond engagement ring was also missing and reported that to the sheriff's department as well. This item was later located at a different pawn shop. Per the testimony of the pawn shop owners, defendant pawned the ring on 17 March 2003 and the bracelet on 10 April 2003. Neither had been redeemed by defendant, and thus both had been put up for sale to the public.

Defendant was arrested and charged with two counts each of felonious larceny and felonious possession of stolen goods for the ring, valued at \$2,000.00, and for the bracelet, valued at \$1,800.00. A jury found defendant guilty of non-felonious larceny and non-felonious possession of stolen goods as to the ring; felonious larceny and felonious possession of stolen goods as to the bracelet; and being a habitual felon. At the sentencing hearing, defendant was determined to have a prior record level of IV and sentenced to a term of 107 to 138 months' imprisonment for all offenses. Defendant now appeals.

[¶] Defendant first argues that the trial court erred by allowing Ms. Eckard to testify as to defendant's other bad behavior during their relationship, including that defendant had taken multiple items of

STATE v. HAGER

[203 N.C. App. 704 (2010)]

jewelry, had assaulted her, and had stolen her car when he was indicted only for stealing two items of jewelry. We disagree.

We note that defendant does not argue that such testimony was damaging to defendant's character and thus should not have been admitted; instead, he argues that Ms. Eckard's testimony constituted evidence of crimes other than those in the indictments, creating a fatal variance between them. Defendant does not explain further why this evidence—which was presented in addition to evidence that defendant took and pawned without permission the ring and bracelet, the larceny of which he *was* charged with—constitutes such a fatal variance from the indictments. As such, we overrule this assignment of error.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss because the State provided insufficient evidence to prove defendant committed the crimes of larceny and possession of stolen goods. We disagree.

When considering a defendant's motion to dismiss for insufficiency of the evidence, "the question for the [c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quotations and citation omitted). In so considering,

we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. . . . Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

Id. at 596, 573 S.E.2d at 869 (quotations and citation omitted).

"Larceny is the wrongful taking and carrying away of the personal property of another without his consent and with the intent to permanently deprive the owner thereof." *State v. Green*, 310 N.C. 466, 468, 312 S.E.2d 434, 436 (1984) (citation omitted). The taking is a Class H felony when the value of the property taken is more than \$1,000.00 and a Class 1 misdemeanor when it is below \$1,000.00. N.C. Gen. Stat. § 14-72(a) (2009).

STATE v. HAGER

[203 N.C. App. 704 (2010)]

We note first that, although defendant nominally includes his convictions for possession of stolen goods in this argument, he in fact argues only as to whether the items were taken without consent and whether defendant intended to permanently deprive the owner of them. As neither of these is an element of possession of stolen goods, we consider his argument only as it relates to his convictions for larceny. See *State v. Martin*, 97 N.C. App. 19, 25, 387 S.E.2d 211, 214 (1990) (listing elements as “(1) possession of personal property; (2) having a value in excess of \$[1,000.00]; (3) which has been stolen; (4) the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) the possessor acting with a dishonest purpose”).

As to taking the items without Ms. Eckard’s consent, defendant argues simply that the State introduced no evidence on the point except the testimony of Ms. Eckard, whom defendant characterizes as untruthful. Ms. Eckard specifically testified that she had given no one permission to remove the items in question from her home. Defendant points to no evidence to the contrary, relying solely on his statement that Ms. Eckard’s testimony was motivated by revenge. Taking the evidence in the light most favorable to the State, this testimony is sufficient evidence that the items were taken without Ms. Eckard’s consent.

Next, defendant argues that the State did not introduce sufficient evidence of his intent to permanently deprive Ms. Eckard of the items because, as various witnesses testified, defendant had several times previously pawned items, then redeemed them. This argument is without merit. As our Supreme Court has stated, “the intent to permanently deprive need not be established by direct evidence but can be inferred from the surrounding circumstances.” *State v. Kemmerlin*, 356 N.C. 446, 474, 573 S.E.2d 870, 889 (2002) (citation omitted). We note first that defendant’s argument, even if taken as true, shows only that he did not intend to deprive *himself* of the property permanently; it has no bearing on whether he intended to deprive Ms. Eckard of them. Regardless, defendant’s exchanging the items for cash certainly constitutes circumstances from which “a reasonable inference of defendant’s guilt may be drawn[.]” *Scott* at 596, 573 S.E.2d at 869.

We find that the trial court did not err in denying defendant’s motion to dismiss these charges. As such, we overrule this assignment of error.

STATE v. HAGER

[203 N.C. App. 704 (2010)]

[3] Defendant next argues that the trial court committed plain error in sentencing him to a term of imprisonment of 107 to 130 months because such a sentence “amounts to excessive punishment.” Essentially, defendant’s argument is that the sentence seems too long given the crimes for which he was convicted. He does not argue that the term imposed was incorrect under the statutory guidelines, nor that defendant should not have been classified as a habitual felon; he argues simply that the punishment seems excessive and in violation of the Eighth Amendment. Construing defendant’s argument as a constitutional challenge to the Habitual Felon Act, we note that our Supreme Court has considered this issue and found the Act constitutional. *See State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985). Here, as in *Todd*,

although defendant’s challenge to the severity of his sentence is couched in terms of an eighth amendment proportionality analysis, we believe that the proper review involves a determination, under the Fair Sentencing Act, of whether there has been a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness or injustice, or conduct which offends the public sense of fair play.

Id. at 119, 326 S.E.2d at 254 (quotations and citation omitted). To aid this Court in making such a determination, defendant points to his lack of use of force in committing the crimes and the delay in Ms. Eckard’s reporting the crimes. We decline to hold that such circumstances rise to the level of grievous error outlined by the Court in *Todd*. As such, this argument is overruled.

[4] Defendant next argues that the trial court erred in allowing the State to alter the bill of indictment for the offense of habitual felon after the close of evidence. The bill of indictment gave the date of one of his prior offenses incorrectly, listing it as 1 December 1989 instead of 12 December 1989. Defendant moved to dismiss this charge at trial on this basis; that motion was denied by the trial court. Defendant construes this ruling as allowing the State to amend the indictment, which is expressly forbidden by N.C. Gen. Stat. § 15A-923(e) (2009). He urges this Court to reverse his conviction of this charge on that basis.

However, as this Court has repeatedly held, such clerical errors on habitual felon indictments do not affect their validity. “The essential purpose of [a] habitual felon indictment is to give a defendant

STATE v. HAGER

[203 N.C. App. 704 (2010)]

notice he is being charged as [a] habitual felon so he may prepare a defense as to having a charge of the . . . listed felony convictions.” *State v. Bowens*, 140 N.C. App. 217, 225, 535 S.E.2d 870, 875 (2000) (citation omitted). In *State v. Campbell*, this Court noted that N.C. Gen. Stat. § 15A-923(e)

provides that “[a] bill of indictment may not be amended;” however, “amendment” in this context has been interpreted to mean “any change in the indictment which would substantially alter the charge set forth in the indictment.” Where time is not an essential element of the crime, an amendment in the indictment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment. A change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges.

133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735 (1999) (citations omitted). Defendant does not argue that the typo in reporting his offense from more than twenty years ago in some way misled or surprised him as to the charge of his being a habitual felon. As such, this assignment of error is overruled.

[5] Defendant next argues that the trial court committed plain error by sentencing defendant as a habitual felon because of the way in which his prior record level was calculated. He argues first that the State did not present evidence proving all of defendant’s prior convictions and, second, that the State used some of those convictions twice—once in calculating his prior record level, and once in supporting defendant’s habitual felon status. While it is indeed true that the State must prove each of a defendant’s prior convictions to determine his prior record level, N.C. Gen. Stat. § 15A-1340.14 (2009), and that the State may not use prior offenses both to determine prior record level and establish a defendant as a habitual felon, N.C. Gen. Stat. § 14-7.6, defendant in this case cannot show that the trial court committed error.

As a preliminary matter, “[w]e first note that plain error analysis in criminal cases is only applicable to evidentiary rulings and to jury instruction errors.” *State v. Scott*, 180 N.C. App. 462, 464, 637 S.E.2d 292, 293 (2006). As such, defendant’s argument based on plain error is “improper.” *Id.* However, “errors as to sentencing are appealable if there has been an incorrect finding of the defendant’s prior record level even in the absence of an objection at trial” per N.C. Gen. Stat.

STATE v. HAGER

[203 N.C. App. 704 (2010)]

§ 15A-1442(5b)(a) (2009), and as such we review defendant's argument. *Id.*

[6] As the State notes, defendant's arguments in his brief refer only to "prior convictions," rather than specifying which of the several dozen such prior convictions that appear on the sentencing worksheets submitted by the State he believes were not fully proven or were counted twice by the trial court. We decline to examine each conviction individually when defendant himself apparently does not consider such a review necessary. Further, we note that defendant expressly stipulated to his prior record level during an extended colloquy involving the judge, both attorneys, and defendant himself. *See* N.C. Gen. Stat. § 15A-1340.14(f)(1) (2009) (giving stipulation by the parties as a valid method via which to prove a prior conviction). The question of which convictions were used for which purpose was also considered at that hearing and resolved. As such, we overrule this assignment of error.

[7] Defendant's final argument is that the trial court erred by entering judgment against him for both larceny and possession of stolen goods. We agree. *See State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982) (holding that "though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses"). Although the trial court in this case consolidated the judgments for sentencing, this Court has specifically held that "consolidation of the convictions for judgment does not cure this error[.]" *State v. Owens*, 160 N.C. App. 494, 499, 586 S.E.2d 519, 523 (2003).

Accordingly, we vacate defendant's conviction for possession of stolen goods and remand to the trial court to arrest the judgment previously entered for possession of stolen goods, as well as for resentencing.

No error in part; reversed and remanded in part.

Judges STEELMAN and HUNTER, JR., Robert N., concur.

STATE v. HALL

[203 N.C. App. 712 (2010)]

STATE OF NORTH CAROLINA v. JASMINE MONQUE HALL

No. COA09-1097

(Filed 4 May 2010)

1. Drugs— sufficient evidence—possession of ecstasy and ketamine

The trial court did not err in denying defendant's motion to dismiss charges of possession of ecstasy and possession of ketamine and to set aside the verdicts of guilty on those charges because there was substantial evidence of the essential elements of both crimes. Defendant's argument that she could not have been guilty of possessing both ecstasy and ketamine because the substances were contained in the same pill was not a question for the Court when considering the denial of the motion to dismiss.

2. Appeal and Error— issue not preserved for appellate review—trial court did not rule on motion

Defendant's argument that convictions for possession of ecstasy and ketamine that were contained in a single pill violated the double jeopardy provisions of the Fifth Amendment, and thus the trial court erred in failing to arrest one of the judgments, was not properly before the Court of Appeals where the trial court did not rule on defendant's request to arrest the judgment for possession of ketamine.

3. Sentencing— possession of two controlled substances in a single pill—no error

The trial court did not err by entering sentences for both possession of ecstasy and possession of ketamine when both controlled substances were contained in a single pill. The double jeopardy protections of the Fifth Amendment were not implicated and any amount of ecstasy and any amount of ketamine found in defendant's possession was sufficient to charge defendant with possession of both controlled substances.

Appeal by Defendant from judgments and commitments entered 26 March 2009 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 8 March 2010.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, for Defendant-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Tracy C. Curtner, for the State.

STATE v. HALL

[203 N.C. App. 712 (2010)]

STEPHENS, Judge.

On 26 March 2009, a jury found Jasmine Monque Hall (“Defendant”) guilty of possession of 3-4 Methylenedioxymethamphetamine, a schedule I controlled substance that is also known as “ecstasy,” and ketamine, a schedule III controlled substance. The pertinent evidence presented at trial tended to show the following:

On 26 November 2007 at approximately 3:00 a.m., Sergeant Bill Kozak (“Sergeant Kozak”) of the Leland Police Department initiated a traffic stop of Defendant’s vehicle after observing Defendant driving in excess of the posted speed limit of 45 miles per hour and noticing that her license tag was expired. Defendant had two passengers in her vehicle at the time, a male in the front seat and a female in the rear passenger seat. Defendant searched through her purse to retrieve her driver’s license, and Sergeant Kozak noticed an odor of marijuana. Officer A. Naughten, who was riding with Sergeant Kozak that evening, remained with Defendant’s vehicle while Sergeant Kozak called for a Canine Unit. Officer Ronald Clarke (“Officer Clarke”), who was newly assigned to the Leland Police Department’s Canine Unit, arrived at the scene within two minutes of receiving Sergeant Kozak’s call. Officer Clarke walked the canine officer around Defendant’s vehicle, and the dog sat on both the left and right sides of the vehicle, indicating that the dog smelled the presence of illegal narcotics.

A subsequent search of Defendant’s vehicle¹ revealed the presence of a cigarette which was believed to contain marijuana and two green pills that, based on his experience, Sergeant Kozak believed to be ecstasy. Defendant admitted ownership of the cigarette but denied any knowledge or ownership of the pills. Sergeant Kozak placed Defendant under arrest, advised her of her *Miranda* rights, and transported Defendant to the police station.

Following Defendant’s arrest, the two green pills were packaged and sent to the State Bureau of Investigation (“SBI”) for testing. The SBI analysis revealed that each green pill weighed 0.5 grams and contained both ecstasy and ketamine.² The cigarette which was believed to contain marijuana was inadvertently destroyed by law enforcement in February 2009. The State subsequently dismissed the charges of possession of marijuana and possession of drug paraphernalia.

1. The legality of the search of Defendant’s vehicle is not disputed in this case.

2. Ketamine “is a pain killer used primarily for animals[,] but [it is] also known to be used to facilitate ‘date rape’ by causing mental and physical impairment and memory loss.” *State v. Peloso*, 109 Conn. App. 477, 484 n.9, 952 A.2d 825, 831 n.9 (2008).

STATE v. HALL

[203 N.C. App. 712 (2010)]

Defendant did not present any evidence. At the conclusion of the State's evidence and the close of all evidence, Defendant made motions to dismiss, which were denied. The jury found Defendant guilty of possession of ecstasy, a Schedule I controlled substance, and ketamine, a Schedule III controlled substance. Defendant renewed all previous motions and made a motion to set aside the jury's verdict, all of which were denied. Defendant was sentenced to five to six months imprisonment for possession of ecstasy; this sentence was suspended, and Defendant was placed on supervised probation for 18 months. Defendant was sentenced to 45 days imprisonment for possession of ketamine.

*Discussion**A. Motions to Dismiss*

[1] In her first argument on appeal, Defendant contends that the trial court erred in denying her motions to dismiss and to set aside the verdicts because she should not have been convicted of possessing two illegal substances when these substances were contained in a mixture in a single pill.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "In conducting our analysis, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

Possession of a controlled substance has two essential elements: (1) the substance must be possessed, and (2) the substance must be knowingly possessed. *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977); *see also* N.C. Gen. Stat. § 90-95(a)(3) (2008) ("Except as authorized by this Article, it is unlawful for any person . . . [t]o possess a controlled substance.").

Defendant concedes that "there was sufficient evidence to submit at least one charge to the jury[.]" However, Defendant contends that the trial court erred in submitting *both* felony possession of ecstasy and misdemeanor possession of ketamine because "the substances were included in the same single pill."

STATE v. HALL

[203 N.C. App. 712 (2010)]

Defendant's argument does not challenge the sufficiency of the evidence of her possession of ecstasy or ketamine, which is the question for this Court when considering the denial of a motion to dismiss. *See Powell*, 299 N.C. at 98, 261 S.E.2d at 117. Instead, Defendant's argument that the trial court could not legally submit both possession charges to the jury is essentially the same as her argument that the trial court erred by entering sentences for both possession of ecstasy and possession of ketamine. *See infra*. Accordingly, the assignments of error upon which Defendant's first argument is based are overruled.

B. Request to Arrest Judgment

[2] In her second argument, Defendant contends that convictions for possession of two illegal substances that were contained in a single pill violates the double jeopardy provisions of the Fifth Amendment, and thus, that the trial court erred in failing to arrest one of the judgments. This argument is not properly before us.

At trial, Defendant gave oral notice of appeal after Judge Lewis sentenced Defendant. Thereafter, the following exchange occurred:

[DEFENSE COUNSEL]: I would ask your honor to consider allowing [Defendant] to post bail, pending the appeal. Also, this case presents an interesting issue upon review, in that these pills—she was indicted for two separate compounds, two separate charges and all of the—it's a mixture within the pills. It's like felony murder, where you arrest the underlying felony. It may be appropriate in this case to arrest the judgment for the misdemeanor, seeing as how she's been found guilty of a felony, also.

[THE COURT]: Anything from the State?

[THE STATE]: Your honor, they're two distinct controlled substances. No different if you had heroin and cocaine or PCP and marijuana.

[DEFENSE COUNSEL]: But it is different because it's all the same pills. There's two pills. The State said, after the jury came back, that they didn't believe she knew that there was katamine [sic].

[THE STATE]: I believe she knew she had a controlled substance, not the identity of that controlled substance.

[THE COURT]: She's in your custody, Mr. Sheriff. As to the bond, denied.

STATE v. HALL

[203 N.C. App. 712 (2010)]

Because the trial court did not rule on Defendant's request to arrest the judgment for possession of ketamine, this issue is not preserved for our review.

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. . . .*

N.C. R. App. P. 10(b)(1) (2008) (emphasis added). Thus, the assignment of error upon which this argument is based is dismissed.³

C. Sentencing

[3] In her final argument, Defendant contends that the trial court erred by entering sentences for both possession of ecstasy and possession of ketamine when both controlled substances were contained in a single pill and that this sentence violates the double jeopardy provision of the Fifth Amendment of the Constitution of the United States. The State contends that Defendant has not preserved this issue for our review because she failed to object to her sentences at trial. However, in *State v. Curmon*, 171 N.C. App. 697, 615 S.E.2d 417 (2005), our Court held that “[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal.” *Id.* at 703, 615 S.E.2d at 422 (internal citation and quotation marks omitted). Accordingly, Defendant was not required to object at sentencing to preserve this issue on appeal. *Id.* at 704, 615 S.E.2d at 422-23.

The Fifth Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, protects against double jeopardy, which includes multiple punishments for the same offense. *State v. Cameron*, 283 N.C. 191, 197-98, 195 S.E.2d 481, 485 (1973); U.S. Const. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”).

The test of [double jeopardy, or] former jeopardy[,] is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.

3. Even were the issue properly before us, it is resolved by our discussion *infra*.

STATE v. HALL

[203 N.C. App. 712 (2010)]

Hence, the plea of former jeopardy, to be good, must be grounded on the 'same offense,' both in law and in fact, and it is not sufficient that the two offenses grew out of the same transaction. If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise not. However, if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained. . . .

Cameron, 283 N.C. at 198, 195 S.E.2d at 486.

Defendant contends that her convictions for possession of two controlled substances where the controlled substances were contained in a single pill subject her to double jeopardy. Specifically, Defendant argues "that the Controlled Substances Act . . . allow[s] the State to charge drug offense[s] based upon a quantity, even if the quantity contains some mixture of other cutting agents or controlled substances[.]" and that "[t]he statute does not allow the State to charge separate offenses when there is a mixture." In support of her argument, Defendant cites, *inter alia*, *State v. Broome*, 136 N.C. App. 82, 523 S.E.2d 448 (1999) and *State v. Agubata*, 92 N.C. App. 651, 375 S.E.2d 702 (1989), where a defendant's conviction under the Controlled Substances Act was based on the total weight of a mixture containing a controlled substance rather than the lesser weight of the controlled substance in its pure form. *Broome*, 136 N.C. App. at 86, 523 S.E.2d at 452 (Possession of 273-gram mixture containing only 27 grams of pure cocaine was legally sufficient to support conviction for trafficking in 200-400 grams of cocaine); *Agubata*, 92 N.C. App. at 658-59, 375 S.E.2d at 706-07 (Defendant charged with trafficking in heroin was not entitled to instruction on lesser-included offense of felonious possession of heroin, though total weight of pure heroin found, excluding other controlled substances in mixture, was less than four grams; statute allowed for conviction based on total weight of heroin mixed with other substances).

Defendant's argument misses the mark. The quantity of ecstasy and ketamine contained in each pill found in Defendant's possession was irrelevant to Defendant's convictions. *Any amount* of ecstasy and *any amount* of ketamine found in Defendant's possession would have been sufficient to charge Defendant with possession of *both* controlled substances. Pursuant to N.C. Gen. Stat. § 90-95(a)(3), "it is unlawful for any person . . . [t]o possess a controlled substance." A

STATE v. JOHNSON

[203 N.C. App. 718 (2010)]

person will be deemed “to possess” ecstasy if that person is in possession of “[a]ny material, compound, mixture, or preparation which contains any quantity of . . . [ecstasy].” N.C. Gen. Stat. § 90-89(3)(a) (2008). Likewise, a person is considered “to possess” ketamine if that person is in possession of “[a]ny material, compound, mixture, or preparation which contains any quantity of . . . Ketamine.” N.C. Gen. Stat. § 90-91(b)(12) (2008). Neither the presence nor the amount of ecstasy contained in each pill had any bearing on Defendant’s conviction for possession of ketamine, and *vice versa*. Accordingly, the double jeopardy protections of the Fifth Amendment were not implicated in this instance. *See Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932) (“[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”). Thus, the mere *presence* of ecstasy and ketamine contained in each pill was sufficient to support both of Defendant’s convictions as well as Defendant’s sentences.

NO ERROR.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. WILLIE WALKER JOHNSON

No. COA09-966

(Filed 4 May 2010)

1. Appeal and Error— appealability—effective assistance of counsel—dismissed without prejudice

Defendant’s claim of ineffective assistance of counsel was dismissed without prejudice to his right to file a motion for appropriate relief in superior court. The claim could not be evaluated on direct appeal because no evidentiary hearing was held on defendant’s motion to suppress.

2. Evidence— police report—corroboration—actual possession of drugs

Although defendant contends the trial court erred in a felonious possession of cocaine case by admitting a portion of a com-

STATE v. JOHNSON

[203 N.C. App. 718 (2010)]

puter generated copy of a police report as a prior consistent statement for the purpose of corroborating the arresting officer's testimony, its effect would not have been prejudicial even if erroneously admitted given the uncontradicted evidence of actual possession of cocaine by defendant.

3. Drugs— possession of cocaine—motion to dismiss—motion to suppress not well grounded

The trial court did not err by denying defendant's motion to dismiss the charge of possession of cocaine. Defendant conceded that his motion was not well grounded if his motion to suppress was not granted, and no court overruled or reversed the denial of the motion to suppress.

Appeal by defendant from judgment entered 15 October 2008 by Judge Clifton E. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 2010.

Attorney General Roy Cooper, by Assistant Attorney General, James M. Stanley, Jr., for the State.

William D. Auman for defendant appellant.

HUNTER, JR., Robert N., Judge.

Willie Walker Johnson ("defendant") appeals as a matter of right from a verdict finding him guilty of felonious possession of cocaine and attaining the status offense of habitual felon. On appeal, defendant argues the following: (1) that he received ineffective assistance of counsel due to his trial counsel's failure to timely file a motion to suppress as provided in N.C. Gen. Stat. § 15A-975(b) (2009); (2) that the trial court committed prejudicial error by admitting a non-testimonial computer based criminal background check which was provided to the arresting officer by his assistant at the time of defendant's arrest; and (3) that the trial court erred in denying defendant's motion to dismiss the charge of possession of cocaine. After review, we dismiss the defendant's claim of ineffective assistance of counsel without prejudice and hold that defendant's trial and judgment was otherwise free of prejudicial error.

I. FACTUAL BACKGROUND

The Mecklenburg County grand jury indicted defendant for attaining habitual felon status, possession of drug paraphernalia, and possession of crack cocaine. On 8 October 2008, following receipt of

STATE v. JOHNSON

[203 N.C. App. 718 (2010)]

the State's written notice to introduce "evidence obtained by virtue of a search without a warrant," defendant's trial counsel filed a written motion to suppress evidence. Subsequently, on 13 October 2008, the trial court denied defendant's motion to suppress, ruling that the motion was untimely.

At trial, the State's evidence tended to show the following: At approximately 9:30 a.m. on 9 August 2007, Officer Brian Smith of the Charlotte Police Department received a call from someone stating that a car was parked in the grass near a vacant house on Clyde Drive in an area used for overflow parking by a church. Officer Smith did not activate his blue lights when approaching the scene.

Upon his arrival, Officer Smith noticed that no other cars were parked in the area and he observed a man asleep in the driver's seat which had been adjusted to a reclining position. Officer Smith testified that he saw a metal crack pipe on the floorboard between defendant's legs through the open driver's side window of the car. At that point, Officer Smith woke defendant, asked him to step out of the vehicle, and placed him under arrest for possession of drug paraphernalia. Officer A.G. Davis, Officer Smith's back-up officer, searched police computer records for outstanding warrants against defendant. After the records search showed the existence of unserved warrants, defendant was arrested on these charges as well.

During Officer Smith's search of defendant incident to these arrests, a rock of crack cocaine was found in defendant's right front pants pocket. Officer Smith also found a plastic bag containing crack cocaine in an eyeglass case while searching the interior dashboard of the car.

Shortly thereafter, Officer Smith prepared a report of the arrest, including Officer Davis's outstanding warrant search, as a part of a computerized system for storing police reports called "KBCOPS." Although Officer Davis did not testify at the trial, the results of his search (after redaction of some material) were admitted into evidence for "corroboration" purposes. Upon admitting the KBCOPS report in evidence, the trial court gave a limiting instruction to the jury, providing that the report should solely be used for corroborative purposes.

At the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court denied defendant's motion to dismiss. Defendant did not offer any evidence, and

STATE v. JOHNSON

[203 N.C. App. 718 (2010)]

renewed his motion to dismiss the charges; the trial court, again, denied the motion.

The jury found defendant guilty of possession of cocaine and was not able to reach a verdict on the charge of possession of drug paraphernalia; therefore, the trial court declared a mistrial on the latter issue. After the jury found defendant guilty of possession of cocaine, the State presented evidence that defendant had attained habitual felon status; the jury subsequently found defendant guilty of this offense. Defendant was sentenced within the presumptive range of the guidelines to 168 months' to 211 months' imprisonment.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

[1] Defendant contends that he received ineffective assistance of counsel due to his trial attorney's failure to file a timely written motion to suppress pursuant to N.C. Gen. Stat. § 15A-975(b) (2009). Specifically, defendant contends that the only evidence which justified the officer's search of his person was the crack cocaine pipe that the officer located on the floorboard of defendant's car allegedly in plain view. In his motion to suppress, defendant's counsel's affidavit contended "on information and belief" that the pipe was not in plain view. However, the court dismissed defendant's motion and did not decide this factual issue which was the basis for defendant's arrest, the accompanying search of defendant and his car, and the subsequent production of evidence found in defendant's car and on his person. Defendant argues that the evidence would have been suppressed under the "fruit of the poisonous tree" doctrine, and he would not have been convicted if the motion to suppress had been filed timely.

To obtain relief for ineffective assistance of counsel, a defendant must demonstrate initially that his counsel's conduct fell below an objective standard of reasonableness. The defendant's burden of proof requires the following:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

STATE v. JOHNSON

[203 N.C. App. 718 (2010)]

... “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ”

State v. Quick, 152 N.C. App. 220, 222, 566 S.E.2d 735, 737 (2002) (citations omitted).

Generally, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). A motion for appropriate relief is preferable to direct appeal, “because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to his trial counsel, as well as defendant’s thoughts, concerns, and demeanor.” *Id.* at 554, 557 S.E.2d at 547.

In the instant case, we cannot properly evaluate defendant’s claim of ineffective assistance of counsel on direct appeal because no evidentiary hearing was held on defendant’s motion to suppress. Based on paragraph 4 of defense counsel’s motion to suppress, it appears there is a factual dispute between defendant and the arresting officer as to whether the small metal crack pipe was or was not in plain view. Moreover, the transcript of the trial and order contained therein denying the motion to suppress contain no resolution of this factual issue.

The State contends, based solely on the transcript, that the small metal crack pipe was in plain view. Moreover, we note that defendant did not take the stand at trial. It is clear that defense counsel and defendant desired to have the issue heard and ruled on by the trial court or else they would not have filed the motion to suppress claiming that the pipe was not located in plain view unless the door was opened by the arresting officer. Further, the fact that defense counsel did in fact file a motion to suppress undercuts the State’s argument that counsel’s failure to file the motion was based upon defense counsel’s opinion that the motion had no merit. Regardless, we need not speculate on these issues including any reason for the defense counsel’s failure to timely file a motion to suppress. Based upon this record, it is simply not possible for this Court to adjudge whether defendant was prejudiced by counsel’s failure to file the motion to suppress within the allotted time. Therefore, we dismiss this appeal without prejudice to defendant’s right to file a motion for appropriate

STATE v. JOHNSON

[203 N.C. App. 718 (2010)]

relief in superior court based upon an allegation of ineffective assistance of trial counsel. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985).

III. CORROBORATION OF EVIDENCE

[2] During the trial, the trial judge, over objection, admitted, for corroborative purposes, a statement in a computer generated copy of the police report summarizing the actions the police officers took on the morning defendant was arrested. A summation of defendant's prior criminal records and outstanding warrants was included in the report. Some of this material was redacted by the trial court; however, a portion of the report was admitted as a prior consistent statement for the purpose of corroborating the arresting officer's testimony.

Defendant contends that the trial court erred in admitting the report based on his contention that the statements contained in the report were inadmissible hearsay, not recognized under the public records exception pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(8) (2009). The State, however, contends based upon *State v. Harrison*, 328 N.C. 678, 403 S.E.2d 301 (1991), that the evidence is an out-of-court statement used to corroborate a witness's courtroom testimony, not for the purpose of proving the truth of the matter asserted.

We refrain from resolving this interesting evidentiary issue on appeal. In order for defendant to obtain relief from an erroneous admission of evidence, defendant must show prejudice. "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2009). Given the uncontradicted evidence of actual possession of cocaine by defendant, even if the admission of the corroborative evidence had been erroneous, its effect would not be prejudicial because it is unlikely to have changed the outcome of the trial. Accordingly, this assignment of error is overruled.

IV. MOTION TO DISMISS

[3] Finally, defendant argues that the trial court erred in denying his motion to dismiss the charge of possession of cocaine based on his contention that if his motion to suppress had been granted there would be insufficient evidence, or no evidence, that he ever possessed the cocaine.

STATE v. JOHNSON

[203 N.C. App. 718 (2010)]

The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). " 'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *State v. Turnage*, 362 N.C. 491, 493-94, 666 S.E.2d 753, 755 (2008) (citation omitted). The Court " 'must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.' " *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 926 (1996) (quoting *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986)). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

In his brief, defendant concedes that his motion to dismiss is not well founded if his motion to suppress is not granted. Since defendant's motion to suppress has not yet been granted, it is clear that there is sufficient evidence of record to submit the case to the jury. Specifically, since no court has overruled or reversed the denial of the motion to suppress, there is clearly sufficient evidence in the record that defendant had crack cocaine in his pants pocket. "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). Accordingly, we must deny defendant's assignment of error.

V. CONCLUSION

Based on the foregoing, we dismiss defendant's ineffective assistance of counsel claim and find no prejudicial error.

No error.

Judges JACKSON and BEASLEY concur.

CALDWELL v. SMITH

[203 N.C. App. 725 (2010)]

JOSEPH CALDWELL AND WIFE, SUZANNE CALDWELL, PLAINTIFFS v. DENNIS G. SMITH, AND WIFE, SHIRLEY SMITH, DUANNE TINSLEY AND WIFE, WENDY TINSLEY, AND ENVIRO-MED INDUSTRIES, LLC, D/B/A SUNSHIELD COATINGS USA, DEFENDANTS

No. COA09-1040

(Filed 4 May 2010)

Venue— motion to change—improperly denied

The trial court erred by denying defendants' motion to change venue because N.C.G.S. §§ 1-77 and 1-79 were not applicable and none of the parties resided in Dare County at the commencement of the action. The trial court was required to order a change of venue as demand was properly made and the action was brought in the wrong county.

Appeal by defendants from an order entered 4 May 2009 by Judge Walter H. Godwin, Jr., in Dare County Superior Court. Heard in the Court of Appeals 3 December 2009.

Dixon & Dixon, PLLC, Law Offices, by David R. Dixon, for plaintiff-appellees.

Patrick, Harper & Dixon, LLP, by David W. Hood, for defendant-appellants.

HUNTER, JR., Robert N., Judge.

Defendants appeal from the trial court's order denying their motion for change of venue as of right. Defendants timely filed their motion for change of venue in their answer on the basis that the action was filed by plaintiffs in the wrong county, as no party resided in Dare County at the commencement of the civil action. With regard to defendants' appeal, our Court has held that "the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county." *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975). As we agree with defendants, we reverse and remand this case to the trial court for removal to the proper county.

I. Background

On 13 August 2008, plaintiffs, Joseph and Suzanne Caldwell, filed a complaint against defendants in Dare County alleging six causes of action including: (1) three violations of Chapter 66 of the North

CALDWELL v. SMITH

[203 N.C. App. 725 (2010)]

Carolina General Statutes under N.C. Gen. Stat. §§ 66-95, 66-98, and 66-99 (2009); (2) a violation of Chapter 75 under the Unfair and Deceptive Trade Practices Act; (3) unjust enrichment; and (4) fraud.

Plaintiffs declared in their complaint that they are currently citizens of St. Meinard, Indiana, but allege that they were formerly residents of Dare County, North Carolina. Plaintiffs also declared that defendant Sunshield Coatings USA is a North Carolina Limited Liability Company located in Rutherford County, North Carolina. Plaintiffs do not make any allegations regarding the county of residency of defendants Dennis G. Smith, Shirley Smith, Duanne Tinsley, and Wendy Tinsley. However, in paragraph 3 of the complaint, plaintiff alleges that the cause of action arose in Dare County by alleging that:

Defendants, Dennis G. Smith and wife, Shirley Smith, and Duanne Tinsley and wife, Wendy Tinsley, are citizens of North Carolina and during relevant times contacted the Plaintiffs in Dare County, in person, by telephone, and through other means of communication.

On 24 October 2008, defendants, Dennis and Shirley Smith and Sunshield Coatings USA,¹ filed an answer and motion for change of venue to Rutherford County. Defendants' second defense was for removal of the civil action due to improper venue on the grounds that none of the parties are residents of Dare County. In support of the motion to change venue, on 23 April 2009 defendant Duanne Tinsley submitted an affidavit wherein he provided a sworn statement that "Dennis G. Smith and Shirley Smith live in Rutherford County, North Carolina, defendants Duanne Tinsley and Wendy Tinsley live in Burke County, North Carolina, and defendant Enviro-Med Industries, LLC, d/b/a Sunshield Coatings USA is a North Carolina Limited Liability Company with its principal place of business in Rutherford County, North Carolina."

Defendants' motion to change venue was heard on 27 April 2009 by the Dare County Superior Court. Superior Court Judge Walter H. Godwin, Jr., denied defendants' motion in an order filed 4 May 2009. Defendants properly filed notice of appeal from the superior court's order with the Clerk of Dare County on 22 May 2009.

II. Motion to Change Venue

On appeal, defendants contend that venue is improper in Dare County, North Carolina, because N.C. Gen. Stat. §§ 1-77 and 1-79

1. Defendants, Duanne Tinsley and Wendy Tinsley, were not listed as parties to the Answer because they had not been served with summons and complaint on 26 October 2008 when the Answer and Motion for Change of Venue was filed.

CALDWELL v. SMITH

[203 N.C. App. 725 (2010)]

(2009) are not applicable to the present case and none of the parties resided in Dare County at the commencement of the action. We agree.

Defendants' appeal of the trial court's order denying their Motion to Change Venue is interlocutory as it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Generally, there is no right to appeal an interlocutory order, unless the trial court's decision affects a substantial right of the appellant which would be lost absent immediate review. *Boynnton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 105-06, 566 S.E.2d 730, 731 (2002). The denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper. *See Dixon v. Haar*, 158 N.C. 341, 341, 74 S.E. 1, 2 (1912); *Hawley v. Hobgood*, 174 N.C. App. 606, 608, 622 S.E.2d 117, 119 (2005); *McClure Estimating Co. v. H.G. Reynolds Co., Inc.*, 136 N.C. App. 176, 178-79, 523 S.E.2d 144, 146 (1999); *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984). Therefore, we review defendants' appeal pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2009), as delaying the appeal would prejudice a substantial right of defendants.

Our Court has interpreted the language of N.C. Gen. Stat. § 1-83 to require the trial court to order a change of venue "if demand is properly made and it appears that the action has been brought in the wrong county." *Hawley*, 174 N.C. App. at 609, 622 S.E.2d at 120 (citation omitted); *see also Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) ("The provision in N.C.G.S. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.'").

Generally, absent an applicable specific statutory provision, venue is proper in the county in which any party is a resident at the commencement of the action. N.C. Gen. Stat. § 1-82 (2009). Plaintiffs commenced the present civil action by filing the complaint in Dare County where they assert that the cause of action arose. Plaintiffs contend that venue is proper where the cause of action arose pursuant to N.C. Gen. Stat. §§ 1-77(1) and 1-79(a).

N.C. Gen. Stat. § 1-77(1) provides that venue is proper in the county where the cause of action arose where a party is seeking

[r]ecovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound,

CALDWELL v. SMITH

[203 N.C. App. 725 (2010)]

bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.

In their brief, plaintiffs argue that their complaint seeks recovery of a penalty sanctioned by N.C. Gen. Stat. § 75-16 (2009) for Unfair and Deceptive Trade Practices. Based on this Court's decision in *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 259 S.E.2d 1 (1979), we conclude that plaintiffs' argument is misplaced.

In *Holley* this Court held that the Unfair and Deceptive Trade Practices Act is not a penal statute " ' ' prosecuted for the sole purpose of punishment, and to deter others from acting in a like manner." ' ' 43 N.C. App. at 237, 259 S.E.2d at 7 (citation omitted). The Court explained that punishment is not the sole purpose of the treble damages provision of the Act, as the act has at least three major purposes:

(1) to serve as an incentive for injured private individuals to ferret out fraudulent and deceptive trade practices, and by so doing, to assist the State in enforcing the act's prohibitions; (2) to provide a remedy for those injured by way of unfair and deceptive trade practices; and (3) to serve as a deterrent against future violations of the statute.

Id. "Having multiple objectives of which some are not penal in nature, the statute cannot be deemed a penal statute" *Id.*; see *Huntington v. Attrill*, 146 U.S. 657, 667, 36 L. Ed. 1123, 1127-28 (1892). Applying *Holley* to the present case, plaintiff's claim pursuant to Chapter 75 does not constitute a claim for recovery of a penalty such that venue would be proper in the county where the cause of action arose.

Moreover, N.C. Gen. Stat. § 1-79(a) provides

(a) For the purpose of suing and being sued the residence of a domestic corporation, limited partnership, limited liability company, or registered limited liability partnership is as follows:

- (1) Where the registered or principal office of the corporation, limited partnership, limited liability company, or registered limited liability partnership is located, or
- (2) Where the corporation, limited partnership, limited liability company, or registered limited liability partnership maintains a place of business, or

CALDWELL v. SMITH

[203 N.C. App. 725 (2010)]

- (3) If no registered or principal office is in existence, and no place of business is currently maintained or can reasonably be found, the term “residence” shall include any place where the corporation, limited partnership, limited liability company, or registered limited liability partnership is regularly engaged in carrying on business.

Pursuant to the aforementioned statute, plaintiffs argue that venue is proper in Dare County based on their contention that defendant Enviro-Med Industries LLC d/b/a Sunshield Coatings USA is a limited liability company that maintains a place of business in Dare County. With regard to plaintiffs’ contention, we note that plaintiffs’ complaint does not allege that defendant limited liability company resides, or has a place of business, in Dare County. In fact, paragraph 2 of plaintiffs’ complaint alleges that defendant Enviro-Med Industries, LLC d/b/a Sunshield Coatings USA is a limited liability company of Mill Spring, North Carolina in Rutherford County. Moreover, paragraph 1 alleges that plaintiffs are citizens of St. Meinard, Indiana, but are formerly of Dare County, North Carolina. In addition, defendant Duanne Tinsley’s sworn affidavit in support of the motion to change venue provided that defendants Dennis G. Smith and Shirley Smith live in Rutherford County, North Carolina and defendants Duanne Tinsley and Wendy Tinsley live in Burke County, North Carolina. North Carolina venue is determined at the commencement of the action, as denoted by the filing of the complaint. *See* N.C. Gen. Stat. § 1-82 (2009). Therefore, regardless of whether N.C. Gen. Stat. §§ 1-79 or 1-82 is applied, venue is improper in Dare County because, according to plaintiffs’ complaint and defendant Duanne Tinsley’s undisputed sworn affidavit, no party resided in that county at the commencement of the action.

As noted above, the trial court has no discretion in ordering a change of venue if it appears that the action has been brought in the wrong county. *See Swift & Co.*, 26 N.C. App. at 495, 216 S.E.2d at 465. Accordingly, we reverse the trial court’s order and remand the case for removal of the action to the proper county.

Reversed and remanded.

Judges STROUD and ERVIN concur.

STATE v. ROMAN

[203 N.C. App. 730 (2010)]

STATE OF NORTH CAROLINA v. DONALD O'KEITH ROMAN

No. COA09-1363

(Filed 4 May 2010)

1. Appeal and Error— appealability—judgment arrested

An argument concerning the denial of defendant's motion to dismiss a charge of resisting, delaying and obstructing a public officer was not considered on appeal where the trial court arrested judgment on the charge following the return of the jury verdict.

2. Indictment and Information— variance—warrant and evidence—not material

There was not a fatal variance between the warrant and the State's evidence in a prosecution for assaulting a government officer where defendant contended that he was arrested for being intoxicated and disruptive in public, while the warrant asserted that he was arrested for communicating threats. Whether the arrest was for communicating threats or for being intoxicated and disruptive was immaterial. Moreover, defendant was charged with both offenses and clearly had notice of all of the charges against him.

3. Assault— on a government official—instructions—hitting or pushing officer

There was no plain error in a prosecution for assault on a government officer in the court's instruction on the elements of the charge where the warrant referred to "hitting" the officer in the chest and the instruction referred to "hitting or pushing" the officer. There is no substantive difference between "hitting" and "pushing"; they are merely two words descriptive of the acts constituting defendant's assault on the officer.

Appeal by defendant from judgments entered 1 April 2009 by Judge Vance Bradford Long in Davidson County Superior Court. Heard in the Court of Appeals 13 April 2010.

Attorney General Roy Cooper, by Deputy Director Caroline Farmer, for the State.

Paul Y.K. Castle, for defendant-appellant.

STATE v. ROMAN

[203 N.C. App. 730 (2010)]

STEELMAN, Judge.

Where the trial court arrested judgment on the charge of resist, delay, and obstruct a public officer, defendant's argument regarding an alleged variance between the charging warrant and the evidence presented at trial is not properly before this Court. Where the warrant for assault on a government officer clearly stated that the assault occurred during the discharge of the officer's official duties by arresting defendant, it is immaterial whether the arrest was for communicating threats or for being intoxicated and disruptive in public. There was no substantive difference between the verbs "hitting" and "pushing" in the trial court's jury instruction on the charge of assault on a government officer.

I. Factual Background and Procedural History

This case arises out of a confrontation that occurred on the evening of 17 October 2005 near the corner of Raleigh and Pugh Streets in Lexington between Donald O'Keith Roman (defendant) and Officer Barry Hamilton (Officer Hamilton) of the Lexington Police Department. The testimony presented at trial was sharply conflicting. Because of the nature of defendant's assignments of error, we recite the relevant facts in the light most favorable to the State.

Officer Hamilton was sitting in his patrol car conducting "surveillance for illegal activity" across from a BP Station at about 8:42 p.m. on the evening of 17 October 2005. He observed defendant in the parking lot of the BP Station, yelling and making gestures towards his patrol car. Defendant crossed the road, approached the patrol car, and told Officer Hamilton to move his patrol car. Officer Hamilton declined to move the patrol car, and defendant told him that if he did not move he would "whip [his] ass." Defendant was asked to "move on before he got in trouble." Defendant then threatened to "jerk [Officer Hamilton] through [his] car window and beat [his] ass." Officer Hamilton exited his patrol car, and told defendant that he was under arrest. Defendant responded: "F— your laws. I live by my own laws."

Defendant reached into his pockets. Officer Hamilton advised defendant to turn around and put his hands behind his back. At this point, defendant "took off running." Officer Hamilton pursued defendant to the steps of a residence. Defendant was again told to put his hands behind his back. Defendant lunged at Officer Hamilton, who struck him with his baton. Defendant jumped back up, reached

STATE v. ROMAN

[203 N.C. App. 730 (2010)]

into his pocket again, and “tried to force his way by [Officer Hamilton], he ran into [him], striking [him] in the chest area.” Officer Hamilton struck defendant several more times with his baton, and was finally able to handcuff defendant.

Defendant was charged with four misdemeanors: communicating threats; being intoxicated and disruptive in a public place; resist, delay, and obstruct a public officer in the discharge of his duties; and assault on a government officer. On 1 April 2009, a jury found defendant guilty of all four charges. The trial court arrested judgment on the charge of resist, delay, and obstruct a public officer. Defendant was sentenced to an active term of 150 days on the assault on a government officer charge. The communicating threats and intoxicated and disruptive charges were consolidated for judgment, and defendant was sentenced to a consecutive, active sentence of 60 days. Release pending appeal was denied. Defendant appeals.

II. Denial of Defendant’s Motion to Dismiss

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charges of resist, delay, and obstruct a public officer and assault on a government officer based upon a fatal variance between the warrant and the State’s evidence at trial. We disagree.

A. Standard of Review

In this matter, defendant moved to dismiss these two charges based upon a variance between the warrant and the State’s evidence at the close of the State’s evidence and renewed the motion at the close of all the evidence.

A motion to dismiss for a variance is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged. In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to “the gist of the offense.” This means that the defendant must show a variance regarding an essential element of the offense.

State v. Pickens, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (internal quotation, citation, and alterations omitted).

STATE v. ROMAN

[203 N.C. App. 730 (2010)]

B. Charge of Resist, Delay, and Obstruct a Public Officer

[1] Following the return of the jury verdict, the trial judge arrested judgment on the resist, delay, and obstruct a public officer charge. The trial judge did not articulate in the record his reasoning behind this action. “A motion in arrest of judgment is generally made after the verdict to prevent entry of judgment based on a defective indictment or some fatal defect on the face of the record proper.” *State v. Davis*, 282 N.C. 107, 117, 191 S.E.2d 664, 670 (1972) (citations omitted). In the instant case, the effect of arresting judgment was to vacate the verdict. *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990). Since the verdict has been vacated, it cannot be properly before this Court on appeal. This portion of defendant’s argument is dismissed.

C. Charge of Assault on a Government Officer

[2] The warrant charging defendant with assault on a government officer reads in, pertinent part, that defendant:

willfully did assault and strike [Officer] B. Hamilton, a government officer of the Lexington, NC Police Department by hitting the officer several times in the chest and on his hand and attempting to pick the officer up. At the time of the offense the officer was discharging the following duty of that employment: placing the defendant under arrest for communicating threats to the officer.

Defendant contended at trial, and contends on appeal that Officer Hamilton testified that he was arresting defendant for being intoxicated and disruptive in public, and that this is a fatal variance from the warrant, which asserted the duty being discharged was to arrest defendant for communicating threats. Defendant further asserts that his right to notice of the charges faced under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, section 23 of the North Carolina Constitution were violated as a result of this variance.

We first note that the alleged conduct of defendant giving rise to the charges of communicating threats, and being intoxicated and disruptive in public occurred prior to defendant’s alleged assault on Officer Hamilton. We further note that he was charged with both of these offenses as separate counts in the same warrant.

“In order for a variance to warrant reversal, the variance must be material.” *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453,

STATE v. ROMAN

[203 N.C. App. 730 (2010)]

457 (2002) (citing *State v. McDowell*, 1 N.C. App. 361, 365, 161 S.E.2d 769, 771 (1968)). “A variance will not result where the allegations and proof, although variant, are of the same legal significance. If a variance in an indictment is immaterial, it is not fatal.” *State v. Stevens*, 94 N.C. App. 194, 197, 379 S.E.2d 863, 865 (quotation and citation omitted), *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989).

Defendant was charged pursuant to the provisions of N.C. Gen. Stat. § 14-33(c)(4), which makes it a crime when defendant: “(4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties[.]” N.C. Gen. Stat. § 14-33(c)(4) (2009). In the instant case, the pivotal element was whether the assault was committed while Officer Hamilton was discharging his official duties. The official duty being performed was arresting defendant. Whether the arrest was for communicating threats or for being intoxicated and disruptive is immaterial. The State clearly presented substantial evidence that defendant assaulted Officer Hamilton while he was arresting defendant. There was no fatal variance between the warrant and the State’s evidence.

Further, defendant can show no prejudice, since, as noted above, both the communicating threats and the intoxicated and disruptive conduct occurred prior to the assault, and defendant was charged with both offenses. Defendant clearly had notice of all of the charges against him.

This argument is without merit.

III. Jury Instructions

[3] In his second argument, defendant contends that the trial court committed plain error in instructing the jury on the elements of assault on a government officer. We disagree.

A. Standard of Review

Defendant failed to object to the trial court’s instruction, even though this issue was discussed at the charge conference. Our review is thus limited to plain error analysis. The plain error rule is only applied where, “after reviewing the entire record, . . . it can be fairly said the ‘instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.’ ” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation omitted).

STATE v. ROMAN

[203 N.C. App. 730 (2010)]

**B. Instruction of “Hitting or “Pushing”
Officer Hamilton in the Chest**

The warrant for assault refers to three distinct acts constituting assault: (1) hitting the officer in the chest; (2) hitting the officer on his hand; and (3) attempting to pick the officer up. The trial judge instructed the jury only on “hitting or pushing [Officer] Hamilton on the chest.” Defendant argues that the “pushing” language was not in the warrant, and that by inserting this language the trial court injected a new and improper theory into the case.

Defendant’s brief recites the relevant portion of Officer Hamilton’s testimony. After striking defendant with his baton, defendant got back up. Officer Hamilton testified: “When he tried to force his way by me, he ran into me, striking me in the chest area.” We hold that there is no substantive difference between the verbs “hitting” and “pushing.” They are merely two words descriptive of the acts constituting defendant’s assault on Officer Hamilton. *See State v. Porter*, — N.C. App. —, —, 679 S.E.2d 167, 171 (2009) (holding that for purposes of establishing violence necessary to support a conviction for common law robbery, there was no material difference between whether the defendant struck or pushed the victim). The trial court’s instruction did not constitute error, much less plain error in this case.

This argument is without merit.

Defendant has not argued his remaining assignment of error and it is deemed abandoned. N.C.R. App. P. 28(b)(6) (2009).

NO ERROR IN PART; DISMISSED IN PART.

Judges WYNN and CALABRIA concur.

STATE v. BRASWELL

[203 N.C. App. 736 (2010)]

STATE OF NORTH CAROLINA v. MICHAEL BRASWELL

No. COA09-1477

(Filed 4 May 2010)

Sexual Offenders— failing to register—failing to verify address

The trial court erred by denying defendant's motion to dismiss the charge of failing to register as a sex offender by failing to verify his address. Uncontroverted evidence showed that defendant never received the semi-annual verification form. Further, if a defendant is not found at the registered address, the crime to be charged is failure to report a change of address under N.C.G.S. § 14-208.9A(a)(4).

Appeal by defendant from judgment entered 17 September 2009 by Judge Paul G. Gessner in Durham County Superior Court. Heard in the Court of Appeals 13 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

William B. Gibson, for defendant-appellant.

STEELMAN, Judge.

Where it is uncontroverted that defendant never received the semi-annual notice to verify his sex offender registration information, the trial court erred in denying his motion to dismiss the charge of failing to register as a sex offender by failing to verify his address.

I. Factual Background and Procedural History

The evidence presented in this case is substantially uncontested and consistent. On 18 February 1999, Michael Braswell (defendant) was convicted of the felony of taking indecent liberties with a child. In November of 2000, defendant was placed on the Sex Offender and Public Protection Registration Program pursuant to Article 27A of Chapter 14 of the North Carolina General Statutes. This program initially required defendant to verify his registration information once a year. This provision was modified by 2006 Session Laws Chapter 247, section 7(a) to require verification of registration information every six months. 2006 N.C. Sess. Laws, ch. 247, § 7(a). This change was effective 1 December 2006, and is applicable to "offenses on or after that date." 2006 N.C. Sess. Laws, ch. 247, § 7(b).

STATE v. BRASWELL

[203 N.C. App. 736 (2010)]

Defendant verified his registration information annually from 2000 through 2006, and thereafter twice a year in May 2007, November 2007, and May 2008. On 4 November 2008, the State Bureau of Investigation mailed a verification form to defendant's last known address, as required by N.C. Gen. Stat. § 14-208.9A(a)(1) via certified mail, return receipt requested. This letter was returned unclaimed to the Durham County Sheriff's Office on 2 December 2008. On 23 January 2009, Deputy Kenneth Baker went to defendant's last known address in an attempt to verify his residence as required by N.C. Gen. Stat. § 14-208.9A(a)(4). Two visits were made to the residence on 23 January 2009, and on both occasions, no one answered the door. That same day, a warrant was issued for defendant's arrest for violations of N.C. Gen. Stat. § 14-208.11.

Defendant testified that he never received the November 2008 verification form; that he went to the Durham County Sheriff's Office prior to January 2009 to meet with the person in charge of the sex offender registration program, but that she was out sick; that he made several calls to the person in charge of registration, never spoke to her, but left messages; and when he went to the Sheriff's Office in February 2009, he was arrested. The person in charge of the sex offender registration program testified that defendant had left her several voice mail messages.

On 6 April 2009, the Durham County Grand Jury returned a two-count indictment against defendant, charging him with failing to notify of a change of address and failing to verify his address. On 15 September 2009, the State dismissed the charge of failing to notify of a change of address. The dismissal stated: "The defendant did not change addresses—he still lives at the last registered address[.]" On 17 September 2009, a jury found defendant guilty of failing to register as a sex offender by failing to verify his address. Defendant was found to be a prior record level IV for felony sentencing purposes, and was sentenced from the mitigated range to an active prison term of 18 to 22 months. Release pending appeal was denied. Defendant appeals.

II. Denial of Defendant's Motion to Dismiss.

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss at the close of all of the evidence. The State concedes error, and we agree.

It is uncontroverted that defendant did not change his address. The crime for which he was convicted was failing to verify his

STATE v. BRASWELL

[203 N.C. App. 736 (2010)]

address pursuant to N.C. Gen. Stat. § 14-208.9A(a)¹, the relevant portions of which are as follows:

The information in the county registry shall be verified semianually for each registrant as follows:

(1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Division shall mail a nonforwardable verification form to the last reported address of the person.

....

(4) If the person fails to return the verification form in person to the sheriff within 10 days after receipt of the form, the person is subject to the penalties provided in G.S. 14-208.11. If the person fails to report in person and provide the written verification as provided by this section, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address. If the person cannot be found at the registered address and has failed to report a change of address, the person is subject to the penalties provided in G.S. 14-208.11, unless the person reports in person to the sheriff and proves that the person has not changed his or her residential address.

N.C. Gen. Stat. § 14-208.9A(a) (2007). The relevant portions of N.C. Gen. Stat. § 14-208.11(a) provide:

A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

....

(3) Fails to return a verification notice as required under G.S. 14-208-9A.

....

(7) Fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A.

N.C. Gen. Stat. § 14-208.11(a) (2007).

In order to be convicted for failure to return the verification form after the receipt of the form pursuant to N.C. Gen. Stat.

1. We analyze the instant case under the 2007 version of the statute. We note that an amendment to the statute in 2008 changed the number of days the offender had to return the verification form to the sheriff's office from 10 days to 3 business days. 2008 N.C. Sess. Laws, ch. 117, § 10. This change was effective 1 December 2008.

STATE v. BRASWELL

[203 N.C. App. 736 (2010)]

§ 14-208.9A(a)(4), a defendant must have actually received the verification form. The evidence is uncontroverted that defendant never received the form; therefore, he cannot be convicted for failure to return the verification form. The statute goes on to require that if the form is not timely returned, that the “sheriff shall make a reasonable attempt to verify that the person is residing at the registered address.” N.C. Gen. Stat. § 14-208.9A(a)(4). Deputy Baker performed this duty in the instant case.

However, if a defendant is not found to be at the registered address, the crime to be charged is failure to report a change of address, subject to a defendant proving that he or she has “not changed his or her residential address.” N.C. Gen. Stat. § 14-208.9A(a)(4). As stated above, the State voluntarily dismissed the charge of failure to report a change of address against defendant.

The trial court erred in failing to dismiss the failure to verify his address charge against defendant at the close of all the evidence. The judgment of the trial court is vacated. *See State v. Richardson*, — N.C. App. —, —, 689 S.E.2d 188, 192 (2010) (vacating the defendant’s convictions based upon the trial court erroneously denying the defendant’s motions to dismiss).

VACATED.

Judges WYNN and CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 MAY 2010)

BROCK & SCOTT HOLDINGS, INC. v. LEE No. 09-703	Cumberland (07CVD9648)	Dismissed
DIXON v. SEARS ROEBUCK & CO. No. 09-716	Indus. Comm. (IC385467)	Affirmed
IN RE C.S. No. 09-1560	Mecklenburg (09JA523-527)	Affirmed in part, reversed in part, vacated in part, and remanded
IN RE E.K. & J.R. No. 09-1571	Duplin (08J26-27)	Affirmed
IN RE I.E., E.E., A.E. No. 09-1655	Orange (09JA68-70)	Affirmed in part; vacated and remanded in part
IN RE J.V. No. 09-1619	Stokes (07JA89)	Affirmed
IN RE M. M. E. No. 09-1456	Harnett (07JT181)	Affirmed
IN RE M.K.O. No. 09-1615	Wake (09JT126)	Affirmed
IN RE S.L.B. No. 09-1515	Cleveland (07JT221)	Affirmed
OWENS-BEY v. THE CNTY. OF FORSYTH No. 09-1307	Forsyth (09CVS3535)	Affirmed
STATE v. ALLEN No. 09-1505	Stokes (09CRS50086) (08CRS52701)	Affirmed
STATE v. BELL No. 09-999	Pitt (08CRS50733)	Dismissed in part; no error in part
STATE v. CANNON No. 09-1156	Catawba (08CRS58374)	No Error
STATE v. CARTER No. 09-1073	Guilford (08CRS23253-55) (08CRS95011-12) (08CRS23188)	No Error
STATE v. DAWSON No. 09-910	Lenoir (06CRS54090)	No Error

STATE v. EDGEWORTH No. 09-523	Richmond (04CRS50128)	No prejudicial error
STATE v. EVANS No. 09-369	Robeson (07CRS55184)	Affirmed
STATE v. HOWARD No. 09-900	Mecklenburg (08CRS221476) (08CRS221477) (08CRS46137) (08CRS221479)	No Error
STATE v. LIPSCOMB No. 09-656	Guilford (07CRS104259) (07CRS104260) (07CRS104257)	No Error
STATE v. MANNING No. 09-1008	Wake (08CRS9793) (08CRS9774)	New trial
STATE v. McNEILL No. 09-925	Randolph (02CRS54912)	No Error
STATE v. MILLER No. 09-1123	Guilford (08CRS106178) (08CRS106176)	No Error
STATE v. MOSLEY No. 09-1060	Rutherford (08CRS1264-8) (08CRS51499)	Dismissed
STATE v. NORTON No. 09-1289	Catawba (08CRS8544-45)	No Error
STATE v. RAMBERT No. 09-720	Onslow (07CRS51453) (07CRS50263) (07CRS51450) (07CRS50264)	New trial
STATE v. RICHARDSON No. 09-1394	Halifax (07CRS53259)	No Error
STATE v. SEARS No. 09-864	Cumberland (07CRS58964)	Remanded
STATE v. TODD No. 09-969	Buncombe (08CRS5438) (08CRS61321)	No Error
STATE v. WEBB No. 09-1221	Greene (07CRS700429)	Affirmed
STATE v. WILKINS No. 09-1006	Alexander (07CRS778)	No Error

STATE v. WILSON
No. 09-903

Wake
(07CRS11060)

No Error

STATE v. WRIGHT
No. 09-868

Bladen
(06CRS50242)

No Error

APPENDIXES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING
LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING CERTIFICATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly adopted by the North Carolina Board of Law Examiners on June 9, 2011, and approved by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules and Regulations of the North Carolina Board of Law Examiners, particularly Rule .1203 of the Rules Governing Admission to the Practice of Law in the State of North Carolina, be amended as follows (additions are underlined, deletions are interlined):

.1203 Conduct of Hearings

(1) All hearings shall be heard by the Board except that the Chairman may designate two or more members or Emeritus Members as that term is defined in the Policy of the North Carolina State Bar Council creating Emeritus Members to serve as a Panel to conduct ~~these~~ the hearings.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of July, 2011.

L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined):

Rule 7.3, Direct Contact with Potential Clients

(a)

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from a potential client known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice) subject to the following requirements:

(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in a font that is as large as any other printing on the envelope. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the letter in a font as large as or larger than any other printing contained in the letter ~~the lawyer's or law firm's name in the letterhead or masthead.~~

(2) Electronic Communications. The advertising notice shall appear in the "in reference" block of the address section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing ~~the lawyer's or law firm's name~~ in the body of the communication or in any masthead on the communication.

(3) Recorded Communications. The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.

(d)

Comment

[1]

[7] Paragraph (c) of this rule requires that all ~~direct~~ targeted mail solicitations of potential clients must be mailed in an envelope on which the statement, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES," appears in capital letters. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for ~~direct~~ targeted mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice must also appear at the beginning of an enclosed letter or electronic communication in a font that is at least as large as the font used ~~for the lawyer's or law firm's name in the letter-head or masthead~~ for any other printing in the letter or electronic communication. The font size requirement does not apply to a brochure enclosed with the letter if the letter contains the required notice. As explained in 2007 Formal Ethics Opinion 15, the font size requirement does not apply to an insignia or border used in connection with a law firm's name if the insignia or border is used consistently by the firm in official communications on behalf of the firm. The advertising notice ~~It~~ must also appear in the "in reference to" section of an email communication. The requirement that certain communications be marked, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar,
this the 28th day of July, 2011.

L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules of Professional Conduct as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules of Professional Conduct be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.

For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100 Discipline and Disability of Attorneys

.0112 Investigations: Initial Determination; Notice and Response; Committee Referrals

(a) Investigation Authority—Subject to the policy supervision of the council and the control of the chair~~person~~ of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the chair~~person~~ ~~of the Grievance Committee~~ a report detailing the findings of the investigation.

(b) Grievance Committee Action on Initial or Interim Reports—As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chair~~person~~ of the Grievance Committee may

- (1) treat the report as a final report;
- (2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or
- (3) direct the counsel to send a letter of notice to the respondent.

(c) Letter of Notice, Respondent's Response, and Request for Copy of Grievance—~~If the counsel serves a letter of notice upon the respondent, a letter of notice is sent to the respondent,~~ it will be served by certified mail and will direct that a response be ~~made~~ provided within 15 days of ~~receipt~~ service of the letter of notice ~~upon the respondent.~~ Such response will be The response to the letter of notice shall include a full and fair disclosure of all ~~the~~ facts and circumstances pertaining to the alleged misconduct. The response must be in writing and signed by the respondent. If the respondent requests it, the

~~The~~ counsel will provide the respondent with a copy of the written grievance upon request, except where unless the complainant requests ~~to remain anonymous~~ anonymity pursuant to Rule .0111(d) of this subchapter.

(d) Request for Copy of Respondent's Response—The counsel may provide to the complainant a copy of the respondent's ~~response(s)~~ response to the letter of notice ~~to the complaining party~~ unless the respondent objects thereto in writing.

(e) Termination of Further Investigation—After the Grievance Committee receives the ~~a~~ response to a letter of notice ~~is received~~, the counsel may conduct further investigation or terminate the investigation, subject to the control of the ~~chairperson~~ of the Grievance Committee.

(f) Subpoenas—For reasonable cause, the ~~chairperson~~ of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings which the chair deems ~~deemed~~ necessary or material to the inquiry. Each subpoena will be issued by the ~~chairperson of the Grievance Committee~~, or by the secretary at the direction of the ~~chairperson~~. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the ~~chairperson~~ may examine any such witness under oath or otherwise.

(g) Grievance Committee Action on Final Reports—The Grievance Committee will consider the grievance as ~~As~~ soon as practicable after the receipt of it receives the final report of the counsel ~~or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance~~, except as otherwise provided in these rules.

(h) Failure of Complainant to Sign and Dismissal Upon Request of Complainant—The investigation into the conduct of an attorney alleged misconduct of the respondent will not be abated by ~~the~~ failure of the complainant to sign a grievance, by settlement, or compromise of a dispute between the complainant and the respondent, or by the respondent's payment of, or restitution. The ~~chairperson~~ of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of the counsel where it appears that there is no probable cause to believe that the respondent ~~has~~ violated the ~~Revised~~ Rules of Professional Conduct.

(i) Referral to Law Office Management Training—If at any time prior to a finding of probable cause, the ~~chairperson~~ of the Grievance

Committee, upon the recommendation of the counsel or of the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the ~~chairperson of the Grievance Committee~~ chairperson of the Grievance Committee may, with the respondent's consent, refer the case to a program of law office management training approved by the State Bar. The respondent will then be required to complete a course of training in law office management prescribed by the ~~chairperson of the Grievance Committee~~ chairperson of the Grievance Committee which may include a comprehensive site audit of the respondent's records and procedures as well as attendance at continuing legal education seminars. If the respondent successfully completes the rehabilitation program, the ~~The~~ Grievance Committee can may consider the respondent's successful completion of the law office management training that as a mitigating factor circumstance and may, for good cause shown, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to successfully complete the program of law office management training as agreed, cooperate with the training program's employees or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume the grievance will be included on the Grievance Committee's agenda for consideration of imposition of discipline at the Grievance Committee's next quarterly meeting.

(j) Referral to Lawyer Assistance Program—~~If at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the Committee may refer the matter to the Lawyer Assistance Program Board. The respondent must consent to the referral and must waive any right of confidentiality that the respondent might otherwise have had regarding communications with persons acting under the supervision of the Lawyer Assistance Program Board.~~

(1) If at any time before a finding of probable cause the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the committee may offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers discipline.

If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must

include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program.

(2) Completion of Rehabilitation Program—If the respondent successfully completes the rehabilitation program, the Grievance Committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be included on the Grievance Committee's agenda for consideration of imposition of discipline at the Grievance Committee's next quarterly meeting.

~~(k) Completion of Rehabilitation Program— If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the failure will be reported to the chairperson of the Grievance Committee and the investigation of the grievance will resume.~~

⊕ (k) Referral to Trust Accounting Supervisory Program—

NORTH CAROLINA WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.

For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING REINSTATEMENT

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning reinstatement, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D Rules of the Standing Committees of the North Carolina State Bar, Section .0900 Procedures for Administra- tive Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

....

(b) Contents of Reinstatement Petition. The petition shall set out facts showing the following:

(1)

(6) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 2011] if seven years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member has obtained a passing grade on a regularly scheduled North Carolina bar examination; provided, each year of active licensure in another United States jurisdiction during the period of ~~suspension~~ inactive status shall offset one year of ~~suspension~~ inactive status for the purpose of calculating the seven years necessary to actuate this provision; and

(7)

(c) Service of Reinstatement Petition

....

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.

For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .1500 Regulations Governing the Administration of the Continuing Legal Education Program

.1501 Scope, Purpose and Definitions

(a) Scope

(b) Purpose

(c) Definitions

(1) “Accredited sponsor” shall mean

(13) “Professional responsibility” shall mean those courses or segments of courses devoted to a) the substance, underlying rationale, and practical application of the Rules of Professional Conduct; b) the professional obligations of the lawyer to the client, the court, the public, and other lawyers; ~~and~~ c) moral philosophy and ethical decision-making in the context of the practice of law; and d) the effects of stress, substance abuse, and chemical dependency, or debilitating mental conditions on a lawyer’s professional responsibilities and the prevention, detection, treatment, and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.

(14) “Professionalism” courses are

.1518 Continuing Legal Education Program

(a) Annual Requirement. . . .

(e) The board shall determine the process by which credit hours are allocated to lawyers' records to satisfy deficits. The allocation shall be applied uniformly to the records of all affected lawyers and may not be appealed by an affected lawyer.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.

For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar, Section .2500, Certification Standards for the Criminal Law Specialty

.2501 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law (encompassing both federal and state criminal law), including the subspecialties of state criminal law and juvenile delinquency law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

.2502 Definition of Specialty

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial courts. Subspecialties in the field are identified and defined as follows:

(a) State Criminal Law—The practice of criminal law in state trial courts.

(b) Juvenile Delinquency Law—The practice of law in state juvenile delinquency courts. The standards for the subspecialty are set forth in Rules .2508-.2509.

.2503 Recognition as a Specialist in Criminal Law

A lawyer may qualify as a specialist by meeting the standards ~~set~~ for criminal law or the subspecialties of state criminal law or juvenile delinquency law. If a lawyer qualifies as a specialist by meeting the standards ~~set~~ for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a “Board Certified Specialist in

Criminal Law.” If a lawyer qualifies as a specialist by meeting the standards ~~set~~ for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a “Board Certified Specialist in State Criminal Law.” If a lawyer qualifies as a specialist by meeting the standards for the subspecialty of juvenile delinquency law, the lawyer shall be entitled to represent that he or she is a “Board Certified Specialist in Criminal Law—Juvenile Delinquency.”

....

.2507 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in criminal law, ~~and~~ the subspecialty of state criminal law and the subspecialty of juvenile delinquency law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

.2508 Standards for Certification as a Specialist in Juvenile Delinquency Law

Each applicant for certification as a specialist in juvenile delinquency law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of juvenile delinquency law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of juvenile delinquency law, but not less than 400 hours in any one year. “Practice” shall mean substantive legal work, specifically including representation of juveniles or the state in juvenile delinquency court, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) “Practice equivalent” shall mean:

(A) Service for one year or more as a state district court judge responsible for presiding over juvenile delinquency court for

250 hours each year may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2508(b)(1) above;

(B) Service on or participation in the activities of local, state, or national civic, professional or government organizations that promote juvenile justice may be used to meet the requirement set forth in Rule .2508(b)(1) but not to exceed 100 hours for any year during the five years.

(3) An applicant shall also demonstrate substantial involvement during the five years prior to application unless otherwise noted by providing information that demonstrates the applicant's significant juvenile delinquency court experience such as:

(A) Representation of juveniles or the state during the applicant's entire legal career in juvenile delinquency hearings concluded by disposition;

(B) Representation of juveniles or the state in juvenile delinquency felony cases;

(C) Court appearances in other substantive juvenile delinquency proceedings in juvenile court;

(D) Representation of juveniles or the state through transfer to adult court; and

(E) Representation of juveniles or the state in appeals of juvenile delinquency decisions.

(c) Continuing Legal Education—An applicant must have earned no less than 40 hours of accredited continuing legal education (CLE) credits in criminal and juvenile delinquency law during the three years preceding application. Of the 40 hours of CLE, at least 12 hours shall be in juvenile delinquency law, and the balance may be in the following related fields: substantive criminal law, criminal procedure, trial advocacy, and evidence.

(d) Peer Review –

(1) Each applicant for certification as a specialist in juvenile delinquency law must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by

the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(4) Each applicant must provide for reference and independent inquiry the names and addresses of ten lawyers and judges who practice in the field of juvenile delinquency law or criminal law or preside over juvenile delinquency or criminal law proceedings and who are familiar with the applicant's practice.

(5) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(e) Examination—An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of juvenile delinquency law to justify the representation of special competence to the legal profession and the public.

(1) Terms—The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge in the following topics:

(A) North Carolina Rules of Evidence;

(B) State criminal substantive law;

(C) Constitutional law as it relates to criminal procedure and juvenile delinquency law;

(D) State criminal procedure;

(E) North Carolina Juvenile Code, Subchapters II and III, and related case law; and

(F) North Carolina caselaw as it relates to juvenile delinquency law.

(3) Examination Components—An applicant for certification in the subspecialty of juvenile delinquency law must pass part

I of the criminal law examination on general topics in criminal law and part IV of the examination on juvenile delinquency law.

.2509 Standards for Continued Certification as a Specialist in Juvenile Delinquency Law

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2509(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2508(b).

(b) Continuing Legal Education—The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law and juvenile delinquency law with not less than six credits earned in any one year. Of the 65 hours, at least 20 hours shall be in juvenile delinquency law, and the balance may be in the following related fields: substantive criminal law, criminal procedure, trial advocacy, and evidence.

(c) Peer Review—The specialist must comply with the requirements of Rule .2508(d) of this subchapter.

(d) Time for Application—Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2508 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2508 of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.

For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2011.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Certification of Paralegals, Section .0100 The Plan for Certification of Paralegals

.0105 Appointment of Members; When; Removal

(a) Appointment. The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member shall be selected by the council from two nominees determined by a vote by mail or online of all active certified paralegals in an election conducted by the board.

(b) Procedure for Nomination of Candidates for Paralegal Members.

(1) Composition of Nominating Committee. . . .

(2) Selection of Candidates. The nominating committee shall meet within 30 days of its appointment to select five (5) certified paralegals as candidates for each paralegal member vacancy on the board for inclusion on the ballot to be mailed to all active certified paralegals.

(3) Vote of Certified Paralegals. At least 30 days prior to the meeting of the council at which a paralegal member appointment to the board will be made, a ballot shall be mailed or a notice of online voting shall be emailed or mailed to all active certified paralegals at each certified paralegal's physical or email address of record on file with the North Carolina State Bar. The ballot or notice shall be accompanied by written instructions, and shall state how many paralegal member positions on the board are subject to appointment, the names of the candidates selected by the nominating committee for each such position, and when and where the ballot should be returned. If balloting will be online,

the notice shall explain how to access the ballot on the State Bar's paralegal website and the method for voting online. Write-in candidates shall be permitted and the instructions shall so state. Each ballot sent by mail shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. Online balloting shall be by secure log-in to the State Bar's paralegal website using the certified paralegal's identification number and personal password. Any certified paralegal who does not have an email address on file with the State Bar shall be mailed a ballot. The board shall maintain appropriate records respecting how many ballots ~~were mailed~~ or notices are sent to prospective voters in each election as well as how many ballots are returned. Only original ballots will be accepted by mail. Ballots received after the deadline stated on the ballot or the email notice will not be counted. The names of the two candidates receiving the most votes for each open paralegal member position shall be the nominees submitted to the council.

(c) Time of Appointment. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2011.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of July, 2011.

L. Thomas Lunsford, II

L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of August, 2011.

Sarah Parker

Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State

Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 25th day of August, 2011.

Jackson, J.
For the Court

HEADNOTE INDEX



WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

ABATEMENT	POSSESSION OF STOLEN PROPERTY
ADOPTION	PREMISES LIABILITY
AIDING AND ABETTING	PUBLICASSISTANCE
APPEAL AND ERROR	PUBLIC OFFICERS AND EMPLOYEES
ASSAULT	PUBLIC RECORDS
ATTORNEY FEES	
	REAL PROPERTY
CHILD ABUSE AND NEGLECT	SEARCH AND SEIZURE
CHILD VISITATION	SENTENCING
CIVIL PROCEDURE	SEXUAL OFFENDERS
CONFESSIONS AND INCRIMINATING STATEMENTS	SEXUAL OFFENSES
CONSTITUTIONAL LAW	STATUTES OF LIMITATION AND REPOSE
CONSTRUCTION	
CLAIMS	TERMINATION OF PARENTAL RIGHTS
CONTRACTS	TORT CLAIMS ACT
CORPORATIONS	TRUSTS
CREDITORS AND DEBTORS	
CRIMINAL LAW	UNFAIR TRADE PRACTICES
	VENUE
DAMAGES AND REMEDIES	WORKERS' COMPENSATION
DECLARATORY JUDGMENTS	
DIVORCE	ZONING
DRUGS	
EMPLOYER AND EMPLOYEE	
EVIDENCE	
FIREARMS AND OTHER WEAPONS	
HOMICIDE	
IMMUNITY	
INDICTMENT AND INFORMATION	
INSURANCE	
JURISDICTION	
JURY	
LARCENY	
MEDICAL MALPRACTICE	
MOTOR VEHICLES	
NEGLIGENCE	
PHYSICIANS	

ABATEMENT

Prior pending action—federal lawsuit—The trial court erred by denying defendants' motion to abate this state lawsuit based upon a prior pending action in a federal lawsuit. Both lawsuits involve substantial identity as to the parties, subject matter, issues, and remedies sought. **State of N.C. Dep't of Health & Human Servs. v. Armstrong**, 116.

ADOPTION

Subject matter jurisdiction—district court and clerk of superior court—The district court lacked subject matter jurisdiction to review and declare void orders from the superior court clerk setting aside adoption decrees where the clerk's orders were both interlocutory and not appealed by plaintiffs. At that point, the adoptions were pending and contested by the maternal grandmother, and should have been transferred to district court. The matter was remanded for the clerk of superior court to determine whether the adoptions were still contested and, if so, to transfer the proceedings to district court. **Norris v. Norris**, 566.

AIDING AND ABETTING

Evidence not sufficient—evidence of principal crime not sufficient—There was insufficient evidence to support a conviction for aiding and abetting malicious secret assault where the State did not produce sufficient evidence of the principal crime. **State v. Holcombe**, 530.

APPEAL AND ERROR

Appealability—effective assistance of counsel—dismissed without prejudice—Defendant's claim of ineffective assistance of counsel was dismissed without prejudice to his right to file a motion for appropriate relief in superior court. The claim could not be evaluated on direct appeal because no evidentiary hearing was held on defendant's motion to suppress. **State v. Johnson**, 718.

Appealability—error in calculating sentence—Defendant's argument that there was plain error in calculating his sentence was reviewed on appeal despite the fact that plain error analysis applies only to evidentiary rulings and jury instruction errors. An incorrect finding of a prior record level is appealable by N.C.G.S. § 15A-1442(5b)(a) even in the absence of an objection at trial. **State v. Hager**, 704.

Appealability—judgment arrested—An argument concerning the denial of defendant's motion to dismiss a charge of resisting, delaying and obstructing a public officer was not considered on appeal where the trial court arrested judgment on the charge following the return of the jury verdict. **State v. Roman**, 730.

Independent juror investigation—constitutional theory not raised below—not preserved for appeal—The trial court did not err by denying defendant's motion for appropriate relief where a juror came forward after the trial to indicate that another juror had investigated evidence on the Internet. Although defendant contended that he was denied his constitutional right to a jury of twelve and that this was reversible error *per se*, he did not raise the issue at trial or preserve it for appellate review. **State v. Armstrong**, 399.

Interlocutory order—denial of Rule 12(b)(6) motion to dismiss—governmental immunity—substantial right affected—A denied Rule 12 (b)(6) motion

APPEAL AND ERROR—Continued

to dismiss by a medical examiner was based on sovereign immunity, affected a substantial right, and was immediately appealable. **Green v. Kearney, 260.**

Interlocutory order—failure to show substantial right—Defendant's appeal from an interlocutory order denying his motions for a new trial and for relief from judgment or order brought under N.C.G.S. § 1A-1, Rules 59(a) and 60 in a divorce case appeal was dismissed. Defendant would not lose a substantial right if the permanent alimony order was not reviewed before final judgment on the equitable distribution claim since it affected only the financial repercussions of the parties' divorce. **Musick v. Musick, 368.**

Interlocutory order—ineffective initial appeal—subsequent final judgment—Plaintiffs' appeal of a protective order as well as an order for summary judgment was properly before the Court of Appeals. Although the initial appeal from the protective order was not immediately appealable, the order granting defendants summary judgment was a final judgment. Thereafter, plaintiffs could timely appeal. **Wilson v. Wilson, 45.**

Interlocutory order—remaining issues resolved—appeal considered—The Court of Appeals considered plaintiff's appeal from the trial court's order dismissing his claim for alimony even though it was interlocutory when appeal was noticed. Because the remaining issues of child support and equitable distribution were resolved after appeal was noticed, there was nothing left for the trial court to determine. **Crowley v. Crowley, 299.**

Interlocutory order—subject matter jurisdiction—governmental immunity—substantial right not affected—An appeal from the denial of a medical examiner's motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity was interlocutory and was dismissed. The general rule is that sovereign immunity is a question of personal jurisdiction rather than subject matter jurisdiction. **Green v. Kearney, 260.**

Issue not preserved for appellate review—trial court did not rule on motion—Defendant's argument that convictions for possession of ecstasy and ketamine that were contained in a single pill violated the double jeopardy provisions of the Fifth Amendment, and thus the trial court erred in failing to arrest one of the judgments, was not properly before the Court of Appeals where the trial court did not rule on defendant's request to arrest the judgment for possession of ketamine. **State v. Hall, 712.**

Issue not preserved for appellate review—trial court did not rule on motion—Defendant's argument that the trial court erred by failing to grant plaintiff's motion to compel arbitration was not properly before the Court of Appeals where the trial court did not address plaintiff's motion to compel arbitration. **Pay Tel Commc'ns, Inc. v. Caldwell Cnty., 692.**

Motion to withdraw plea—failure to show fair and just reason—The trial court did not err in a robbery case by denying defendant's motion to withdraw his no contest/*Alford* plea. Defendant failed to show that a fair and just reason existed for the withdrawal of his plea even though his co-defendant was found not guilty of all charges. Defendant voluntarily and knowingly entered into the plea agreement, and he failed to show he lacked competent counsel at any stage of the proceedings. **State v. Chery, 310.**

APPEAL AND ERROR—Continued

Preservation of issues—argument not raised—Plaintiff was deemed to have abandoned an argument on appeal that a corporation ratified the acts of a supervisor in a wrongful termination suit. Plaintiff did not raise the issue in his brief, cite authority, or point to evidence in the record. **Combs v. City Elec. Supply Co.**, 75.

Preservation of issues—constitutional issue not raised at trial—plain error not raised in brief—considered under Rule 2—A Confrontation Clause argument against the admission of expert testimony from a forensic chemist who relied upon reports from an absent chemist was reviewed for plain error under Rule 2 of the Appellate Rules of Procedure even though defendant had not objected to the evidence on constitutional grounds at trial and did not mention plain error in his brief. **State v. Brennan**, 698.

Preservation of issues—failure to argue—Although defendant assigned error to certain findings of fact made by the trial court, these assignments of error were deemed abandoned under N.C. R. App. P. 28(b)(6) based on his failure to argue them in his brief. **State v. Hagin**, 561.

Preservation of issues—failure to argue—Although plaintiff contended the trial court erred by granting summary judgment in favor of defendants on a breach of warranty claim, plaintiff abandoned this argument by failing to argue it in his brief as required by N.C. R. App. P. 28(b)(6). **Ahmadi v. Triangle Rent A Car, Inc.**, 360.

Preservation of issues—failure to cite authority—Although plaintiff contended the trial court erred by dismissing his negligence complaint under N.C.G.S. § 1A-1, Rules 12(b)(1) and (12)(b)(6), his argument was abandoned based on his failure to cite authority as required by N.C. R. App. P. 28(b)(6). Further, plaintiff's arguments were simply a reprise of his contentions regarding the dismissal of the complaint under Rule 41(a)(1). **Dunton v. Ayscue**, 356.

Preservation of issues—failure to include order in record on appeal—failure to object—Defendant's contention that the trial court erred in admitting testimony that defendant had been on probation was overruled where the sole argument on appeal was based on an alleged order by the trial court which was not included in the record on appeal. Defendant also failed to object to the testimony at trial on the basis that it was beyond the scope permitted by the trial court's earlier ruling. **State v. Curry**, 375.

Preservation of issues—failure to object—Although defendant objected to a portion of the jury charge at trial in a conspiracy and conversion case, defendant failed to preserve this issue for review based on his failure to object despite being given two opportunities to do so. **Mace v. Pyatt**, 245.

Preservation of issues—failure to object at trial—Defendant's argument that the trial court erred in a sexual offenses case by allowing a doctor to testify that she recommended "trauma focus cognitive behavior therapy" for both child victims was overruled as defendant did not raise a proper objection at trial. **State v. Espinoza-Valenzuela**, 485.

Preservation of issues—failure to object to evidence at trial—Defendant failed to timely object to the admission of certain evidence at trial and failed to

APPEAL AND ERROR—Continued

argue plain error on appeal. Defendant thus failed to preserve for appellate review issues concerning the admission of evidence. **State v. Curry, 375.**

Preservation of issues—failure to raise issue of fatal variance at trial—Defendant failed to argue a variance between his indictment for possession of a firearm and the evidence presented at trial or even to argue generally the sufficiency of the evidence regarding the type of firearm or weapon possessed to the trial court. Thus, he waived this issue for appeal. **State v. Curry, 375.**

Preservation of issues—hearsay—issue not preserved—Defendant City of Hickory's challenge on hearsay grounds to several documents in the record was not properly preserved for appellate review. **First Gaston Bank of N.C. v. City of Hickory, 195.**

Preservation of issues—insufficient evidence—no motion to dismiss at trial—Defendant did not preserve for appeal an argument that there was insufficient evidence of the knowledge requirement in a prosecution for driving with a revoked license where defendant did not move at trial for a dismissal of the charge. **State v. Armstrong, 399.**

Preservation of issues—issues conceded or not raised at trial—Defendant did not preserve for appellate review questions of whether he was entitled to directed verdict on his *quantum meruit* claim or whether N.C.G.S. § 20-108(j) operates as a waiver of sovereign immunity. The *quantum meruit* issue was conceded and defendant did not argue waiver of sovereign immunity under this statute at trial. **Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles, 19.**

Preservation of issues—motions for directed verdict denied—no motion on issue appealed from—An argument about the denial of defendant's motion for directed verdict was dismissed where defendant did not make a motion for directed verdict on the only issue that remained after the trial court granted defendant's motions for directed verdicts on other issues. **Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles, 19.**

Preservation of issues—no assignment of error, argument or authority—Arguments in a declaratory judgment trust action relating to the ripeness of the controversy for adjudication were not addressed where they were not assigned error, argued in the briefs, or supported with authority. **First Charter Bank v. Am. Children's Home, 574.**

Preservation of issues—notice of appeal from judgment rather than summary judgment denial—Defendant waived appellate review of an argument concerning the denial of summary judgment where it gave notice of appeal from the judgment in favor of plaintiff but not from the order denying its motion for summary judgment. **Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles, 19.**

Violations of Appellate Rules of Procedure—dismissal not warranted—Plaintiff's alleged violations of the Appellate Rules of Procedure did not warrant dismissal, and the merits of the appeal were reached. **Crowley v. Crowley, 299.**

ASSAULT

In secret—evidence not sufficient—The trial court erred by not dismissing a charge of malicious secret assault for insufficient evidence where the State did not present evidence that the victims were unaware of defendants' purpose prior

ASSAULT—Continued

to the attack, that defendants intended to be furtive in their assault, or that the victims were surprised. In fact, the State's own evidence contradicted the secret manner element of the offense. **State v. Holcombe, 530.**

On a government official—instructions—hitting or pushing officer—There was no plain error in a prosecution for assault on a government officer in the court's instruction on the elements of the charge where the warrant referred to "hitting" the officer in the chest and the instruction referred to "hitting or pushing" the officer. There is no substantive difference between "hitting" and "pushing"; they are merely two words descriptive of the acts constituting defendant's assault on the officer. **State v. Roman, 730.**

ATTORNEY FEES

Declaratory judgment—certificate of need—The trial court did not err in denying plaintiff Hope's request for attorney fees in a certificate of need declaratory judgment action because Hope was not the prevailing party. **Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs., 276.**

CHILD ABUSE AND NEGLECT

Cessation of reunification efforts—sufficiency of findings of fact—The trial court erred in a child neglect case by ceasing reunification efforts without making the appropriate findings required by N.C.G.S. § 7B-507. **In re A.S., 140.**

Dependency—sufficiency of evidence—The trial court did not err by finding three minor children to be dependent juveniles. Taken in their entirety, the factual findings demonstrated that respondent mother had significant mental health issues, the children had special needs, and neither respondent nor another caretaker demonstrated the ability to meet the children's special needs or to otherwise care for them. **In re T.B., C.P., & I.P. 497.**

Fitness and availability to care for child—sufficiency of findings of fact—Although the trial court properly concluded in a child neglect case that the paternal grandmother was not fit and available to care for the minor child, the order failed to contain findings as to the fitness of respondent father to parent the child. The order was reversed and remanded for a new hearing. **In re A.S., 140.**

Neglect—grandmother—effective assistance of counsel—The trial court did not err by adjudicating a minor child neglected under N.C.G.S. § 7B-805 and continuing his placement in the home of the child's maternal grandmother. Respondent mother failed to correct the conditions that led to the removal of the minor child from her care for the prior 16 to 18 months, and the child would be at substantial risk of harm if either parent removed the child from the placement. Further, respondent failed to show she was prejudiced by trial counsel's failure to file a motion to dismiss a second petition as barred by *res judicata* because the motion would have been properly denied. **In re K.J.D., 653.**

Neglect—improper to leave allegation undecided—The trial court erred by leaving the allegation of neglect undecided and by explicitly stating that this allegation might be decided at some point in the future. Nothing in N.C.G.S. § 7B-807(a) allows a trial court to hold in abeyance a ruling on an allegation in a petition alleging abuse, neglect, or dependency. **In re T.B., C.P., & I.P. 497.**

CHILD ABUSE AND NEGLECT—Continued

Reunification—reasonable efforts—The trial court erred in a child neglect case by failing to ensure that petitioner DSS used reasonable efforts to reunify the child with either parent. There was no evidence to support the finding that further efforts to reunify would be futile. **In re A.S., 140.**

CHILD VISITATION

DSS—minimum outline for visitation plan required—The trial court erred by failing to adopt a definitive visitation plan as part of its dispositional decision and leaving respondent mother's visitation with the children to the discretion of DSS. N.C.G.S. § 7B-905(c) provides that any dispositional order which leaves the minor child in a placement outside the home shall provide for appropriate visitation, and our Court of Appeals has held the minimum outline of visitation requires the time, place, and conditions under which visitation may be exercised. **In re T.B., C.P., & I.P. 497.**

CIVIL PROCEDURE

Depositions—non-party witnesses—other lawsuits—summary judgment—Defendant City of Hickory's challenge to plaintiff's reliance on depositions of non-party witnesses taken in other lawsuits to support the factual assertions at summary judgment and in its appellate brief was overruled. Rule 56(c) of the Rules of Civil Procedure does not limit depositions to those taken in the case in which the motion for summary judgment is pending and depositions that meet the requirements of an affidavit may be used in summary judgment proceedings. **First Gaston Bank of N.C. v. City of Hickory, 195.**

Judge erroneously reconsidered legal conclusion of another judge—summary judgment—improperly granted—The trial court erred by granting defendants' motion for summary judgment on plaintiff's § 1983 claims and state constitutional claim based on allegations that defendants declined to renew plaintiff's employment contract in retaliation for plaintiff having filed a complaint in 2000. Judge Spainhour ruled as a matter of law that plaintiff's claims survived defendant's motion to dismiss because plaintiff's 2000 complaint touched on a matter of public concern, and defendant's motion for summary judgment brought this same issue before Judge Beale. Judge Beale was without authority to disregard Judge Spainhour's judicial determination and grant summary judgment on the basis that the 2000 complaint did not relate to a matter of public concern. **Adkins v. Stanly Cnty. Bd. of Educ., 642.**

Stay of proceedings—denial not an abuse of discretion—The trial court did not abuse its discretion in denying defendant's motion to stay domestic proceedings in North Carolina pending the resolution of an Ohio action because the trial court considered the factors enumerated in *Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353. Defendant's argument that various findings and conclusions in the trial court's order were not supported was not a proper issue for consideration on appeal and defendant made no argument that the trial court acted in a patently arbitrary manner. **Muter v. Muter, 129.**

Two dismissal rule—defendant not served in either prior suit—The trial court did not err by dismissing plaintiff's negligence complaint based on the "two dismissal" rule under N.C.G.S. § 1A-1, Rule 41(a)(1) despite defendant not being served in either of the two prior suits. **Dunton v. Ayscue, 356.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Interrogation not by agent of police—The trial court did not err by denying defendant's motion to suppress a written statement given to police because defendant's mother did not act as an agent of the police by asking her son to tell the truth about his involvement in the murder at issue. **State v. Clodfelter, 60.**

Interrogation not custodial—inside police station—officer's unarticulated intent—The trial court correctly ruled that a first-degree murder defendant was not in custody and was not entitled to *Miranda* warnings when he gave inculpatory statements to police. Defendant was brought into the secure area of the police station; although there was an officer outside the open door and another taking notes in an adjacent room, defendant was not aware of these facts. **State v. Little, 684.**

Miranda warning—unsolicited and spontaneous statement—The trial court did not err in denying defendant's motion to suppress a statement made to a police officer while defendant, a juvenile student, was in custody but had not been read his *Miranda* rights because the statement was unsolicited and spontaneous. **In re D.L.D., 434.**

Pre-trial motion to suppress—The trial court did not err by denying defendant's motion to suppress a written statement given to police since defendant's statement was not involuntary because defendant did not request a lawyer and his offer to continue speaking with police officers the following day showed that he was willing to talk with officers. **State v. Clodfelter, 60.**

Pre-trial motion to suppress—not properly preserved—not plain error—Defendant's argument that the trial court erred by denying his motion to suppress a written statement given to police was not properly preserved for appeal where defendant failed to object to the reading of this statement aloud during his trial testimony, or to the statement being introduced into evidence. Reviewed under a plain error standard, defendant failed to show that, had the statement not been admitted, there was a reasonable possibility of a different result. **State v. Clodfelter, 60.**

Pre-trial motion to suppress—not properly preserved—not plain error—Defendant's argument that the trial court erred by granting the State's motion for joinder and by not redacting a statement given to police by a co-defendant was overruled. Defendant failed to properly preserve for appeal the issue of the introduction into evidence of his statement. Reviewed under a plain error standard, defendant failed to show that, had the statement not been admitted, there was a reasonable possibility of a different result. **State v. Clodfelter, 60.**

References to defendant altered—Bruton violation—harmless error—The trial court did not err by admitting into evidence a confession made by a co-defendant where all references in the statement to the objecting defendant were altered pursuant to N.C.G.S. § 15A-927(c)(1), and even if a "*Bruton* violation" occurred, the error was harmless. **State v. Clodfelter, 60.**

CONSTITUTIONAL LAW

Certificate of Need law—right of access to the courts—lack of standing—access not denied—Plaintiffs did not have standing to assert the argument that the Certificate of Need (CON) law, in connection with the Administrative Procedures Act and the North Carolina Administrative Code, denied them access to the

CONSTITUTIONAL LAW—Continued

courts. Moreover, even if plaintiffs' had standing, their argument lacked merit as a CON decision is an administrative decision which is not constitutionally entitled to judicial review or appeal. **Hope—A Women's Cancer Ctr., P.A. v. State of N.C., 593.**

Double jeopardy—second-degree murder and DWI—evidence of malice—Defendant's conviction and sentencing for DWI and second-degree murder did not violate double jeopardy principles, applying *State v. McAllister*, 138 N.C. App. 252. There was evidence that defendant drove while impaired and while his license was revoked after prior convictions for driving while impaired, so that there was evidence of malice other than the impaired driving in this case. Although defendant argued that the DWI was an element of second-degree murder in this case, the trial judge correctly instructed the jury that they could not find defendant guilty of second-degree murder without also finding malice. **State v. Armstrong, 399.**

Effective assistance of counsel—no reasonable probability of different outcome—Even assuming *arguendo* that the performance of defendant's trial counsel was deficient, defendant has not demonstrated that there was a reasonable probability that the result of the trial would have been different but for his trial counsel's actions given the overwhelming evidence supporting defendant's guilt as to the two charged offenses of attempted robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. **State v. Wilson, 110.**

Effective assistance of counsel—no request to record opening and closing statements—Defendant's argument that he did not receive effective assistance of counsel in a first-degree murder trial because his counsel did not request that the court reporter record counsels' opening and closing statements was overruled. The statute does not require that opening and closing statements be recorded in a non-capital trial and defendant did not suggest how the omission prejudiced his case. **State v. Clodfelter, 60.**

Revocation of Medicaid benefits—no Due Process or Equal Protection violation—A Medicaid recipient was not denied Due Process by a delay in the hearing officer's final decision on revocation of benefits where petitioners did not take advantage of their statutory right to compel the hearing officer to take action. Furthermore, there was no Equal Protection violation because the application of the statutes did not arbitrarily classify the decedent. **Cloninger v. N.C. Dep't of Health & Human Servs., 345.**

Right to confront witnesses—forensic chemists—reporting lab results of others—The trial court erred by admitting testimony that material seized from defendant was cocaine where the testimony was given by a SBI forensic chemist based on the reports of another chemist who performed the tests. It was obvious from the testimony that the witness was merely reporting the results of other experts. **State v. Brennan, 698.**

Right to confront witnesses—independent juror investigation—standard—The trial court applied the correct standard to an alleged violation of the right to confront witnesses by placing the burden on the State to rebut the presumption of prejudice and then determining whether the evidence was harmless beyond a reasonable doubt. **State v. Armstrong, 399.**

CONSTITUTIONAL LAW—Continued

Right to counsel—interrogation room—request not custodial—Although a first-degree murder defendant was not in custody, the Court of Appeals ruled as a guide to the trial courts that defendant did not unambiguously ask for an attorney. **State v. Little, 684.**

Substantive due process—Certificate of Need law—no violation—The Certificate of Need (CON) law did not violate plaintiffs' constitutional right to substantive due process of law. The legitimate purpose of enacting the CON law was to protect the health and welfare of North Carolina citizens by providing affordable access to necessary health care. Furthermore, it is a reasonable belief that this goal would be achieved by allowing approval of new institutional health services only when a need for such services had been determined and the CON law contains detailed explanations as to how the requirement of a CON based on need promotes the public welfare. **Hope—A Women's Cancer Ctr., P.A. v. State of N.C., 593.**

CONSTRUCTION CLAIMS

Breach of contract—quantum meruit—unlicensed general contractor—The trial court did not err in a breach of contract and *quantum meruit* case by granting defendant's motion for summary judgment and dismissing plaintiff's complaint with prejudice. Plaintiff could not recover any damages for the "grading" work performed because it was not a licensed general contractor under N.C.G.S. § 87-1. **Lato Holdings, LLC v. Bank of N.C., 332.**

CONTRACTS

Breach of contract—summary judgment—failure to produce material facts—The trial court did not err by granting summary judgment in favor of defendants on a breach of contract claim. Plaintiff failed to present any evidence of a breach of contract when it was undisputed that plaintiff took possession of an automobile upon its sale and that he was provided with a proper title with the lien released following his purchase. **Ahmadi v. Triangle Rent A Car, Inc., 360.**

CORPORATIONS

Derivative claim—shareholder—fiduciary duty—Plaintiffs' complaint alleging breach of fiduciary duty and conversion of corporate property sufficiently alleged that plaintiff Marzec was a shareholder of Nyeco, Inc. and, therefore, that defendant Nye, as majority shareholder, owed a fiduciary duty to plaintiff. **Marzec v. Nye, 88.**

Judicial dissolution—The trial court erred in not ruling on plaintiff Marzec's request for judicial dissolution of Nyeco, Inc. pursuant to N.C.G.S. § 55-14-30(2) as plaintiff's complaint alleged at least two statutory grounds for dissolution. **Marzec v. Nye, 88.**

CREDITORS AND DEBTORS

Modification of designation of exempt property—failure to show change of circumstances—Plaintiff failed to show a change of circumstances authorizing modification of the designation of a debtor's exempt property even though plaintiff contended that the value was improperly estimated by defendant debtor. By failing to object in a timely manner, plaintiff effectively assented to the clerk's

CREDITORS AND DEBTORS—Continued

designation of exempt property. Furthermore, plaintiff did not appeal the clerk's designation of exempt property. **Brock & Scott Holdings, Inc. v. Stone, 135.**

Valuation—findings of fact—fair market value—The trial court did not abuse its discretion by allegedly failing to make the proper findings of fact regarding the fair market value of defendant debtor's property. The trial court was not required to make findings of fact beyond those necessary to resolve the material question raised in this case. **Brock & Scott Holdings, Inc. v. Stone, 135.**

CRIMINAL LAW

Defendant's right to testify—not impermissibly chilled—The trial court did not impermissibly chill defendant's right to testify in his own defense. The trial court's instruction that statements made by defendant at a hearing concerning a plea agreement could be used against him at trial if he testified was not erroneous as the statements were not made during a hearing on a motion to suppress and were not made during the course of plea negotiations. Furthermore, the trial court did not err in concluding that defendant's statements were confessions that could be used against him at trial. **State v. Haymond, 151.**

Deviation from pattern jury instruction—reasonable doubt—The trial court did not err or commit plain error by deviating from the pattern jury instructions' definition of reasonable doubt. The trial court's instruction was substantially correct and omission of the word "fully" did not constitute plain error. **State v. Graves, 123.**

Driving while license revoked—instruction—There was no prejudicial error where the trial court erroneously instructed the jury that the State had proved defendant's knowledge of suspension of his driver's license, but immediately afterward correctly instructed the jury that it must return a verdict of not guilty if the State had not proved notice beyond a reasonable doubt. Viewing the instruction as a whole, the *lapsus linguae* did not implicitly direct a verdict of guilty against defendant. **State v. Armstrong, 399.**

Juror misconduct—independent investigation—harmless error—The trial court did not err in a prosecution for driving while impaired and for second-degree murder by concluding that juror misconduct was harmless beyond a reasonable doubt in light of the evidence presented by the State's witnesses. There was no reasonable possibility that extraneous information could have had an effect on the average juror. **State v. Armstrong, 399.**

Jury instructions—referring to co-defendants as defendants—not plain error—The trial court did not commit plain error by referring to the co-defendants as "defendants" throughout the jury instructions because, given the evidence at trial, defendant cannot show that the error had a probable impact on the jury's finding defendant guilty. **State v. Clodfelter, 60.**

Motion to dismiss—sufficiency of the evidence—breaking or entering—The trial court erred by denying defendant's motion to dismiss three charges of breaking or entering as the State failed to offer sufficient evidence that defendant either broke or entered the three residences. The trial court did not err in denying defendant's motion to dismiss a fourth charge of breaking or entering as the State

CRIMINAL LAW—Continued

presented sufficient evidence that defendant entered the fourth residence. **State v. Haymond, 151.**

Motion to suppress—search warrant—items not listed—plain view doctrine—The trial court did not err in denying defendant's motion to suppress certain items obtained during a search of his residence that were not listed on the search warrant because the police were given consent by the owner of the residence to search some of the items to determine if they were stolen and the remaining items were admissible under the plain view doctrine. **State v. Haymond, 151.**

Motion to suppress—search warrant—sufficient probable cause—The trial court did not err in denying defendant's motion to suppress evidence seized pursuant to a search warrant because, even considering allegedly material facts which defendant contended were intentionally omitted from the application for the warrant, the application was sufficient to establish probable cause to believe the stolen items listed would be found in defendant's home. **State v. Haymond, 151.**

DAMAGES AND REMEDIES

Compensatory damages—punitive damages—willful and wanton conduct—Although the trial court did not err by denying defendant's motion for directed verdict and judgment notwithstanding the verdict on the issues of conspiracy and conversion, defendant was entitled to a partial new trial on the amount of compensatory damages. However, there was no error in submitting the issue of punitive damages to the jury since plaintiff proved the aggravating factor of willful and wanton conduct. **Mace v. Pyatt, 245.**

DECLARATORY JUDGMENTS

Certificate of need—bases of DHHS ruling—The trial court did not err in affirming the Department of Health and Human Service's (DHHS) declaratory ruling that plaintiff Hope's project required a certificate of need where the ruling denied Hope's request "not only for the reasons stated in the ruling, but also for 'additional bases' not discussed in the ruling." Contrary to Hope's contention, this did not "incorporate 416 additional pages of argument against Hope" into the ruling but simply stated that DHHS considered the comments of the Intervenor and that the comments supported the ruling. **Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs., 276.**

Certificate of need—new institutional health service—The trial court did not err in affirming the Department of Health and Human Service's (DHHS) declaratory ruling that plaintiff Hope's project was a "new institutional health service" requiring a certificate of need (CON). The trial court applied the proper standard of review to DHHS's ruling and Hope's project fit within the definition of a "new institutional service" under N.C.G.S. § 131E-176(16)(f1). A Services Agreement pursuant to which Hope would gain possession of equipment identified in (f1) was a "comparable agreement" by which Hope would acquire the equipment within the meaning of the CON law. **Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs., 276.**

Certificate of need law—summary judgment properly denied—The trial court did not err in denying plaintiffs' motion for judgment on the pleadings seeking a declaratory judgment that provisions of the Certificate of Need (CON) law were

DECLARATORY JUDGMENTS—Continued

unconstitutional as applied to plaintiffs. The CON law does not improperly delegate legislative authority to the North Carolina State Coordinating Council (Council) as the Council's role is strictly advisory and the General Assembly has provided an adequate system of procedural safeguards. **Hope-A Women's Cancer Ctr., P.A. v. State of N.C., 593.**

Standard of review—motion to determine beneficiaries—evidence outside of pleadings considered—The standard of review for an order or judgment in a nonjury declaratory judgment action was used by the Court of Appeals in a trust action where respondent appellant asserted that a motion by petitioner trustees was in effect a motion for judgment on the pleadings. The trial court clearly asserted that it carefully reviewed the pleadings and attached exhibits as well as all other matters of record and adjudicative facts. **First Charter Bank v. Am. Children's Home, 574.**

Subject matter jurisdiction—ongoing certiorari proceeding—The superior court had subject matter jurisdiction over plaintiff's declaratory judgment claim concerning the validity of a riparian buffer ordinance and claiming inverse condemnation. The fact that plaintiff's *certiorari* proceeding was on going did not deprive the superior court of subject matter jurisdiction. **Cary Creek Ltd. P'ship v. Town of Cary, 99.**

DIVORCE

Alimony—failure to reply to counterclaim—not deemed an admission—The trial court erred in dismissing plaintiff's claim for alimony after ruling that plaintiff effectively admitted that he was not a dependent spouse by failing to reply to defendant's counterclaim. Defendant failed to make a specific counterclaim for alimony and plaintiff's failure to file a reply re-asserting allegations already made in his complaint did not amount to an admission under N.C.G.S. § 1A-1, Rule 8(d). **Crowley v. Crowley, 299.**

DRUGS

Manufacturing methamphetamine—motion to dismiss—intent to distribute not necessary element of offense—The trial court did not err by denying defendant's motion to dismiss the charge of manufacturing methamphetamine. Defendant was not required to prove the additional element of intent to distribute since he was not charged with either preparation or compounding a controlled substance. **State v. Hinson, 172.**

Possessing precursor chemicals—instruction—actual possession—The trial court did not err by instructing the jury that they could find defendant guilty of possessing precursor chemicals under the theory of actual possession. Defendant failed to show how the instruction would have misled the jury or that any potential error may have prejudiced defendant. However, the conviction under 06 CRS 1602 for possession of precursor chemicals was remanded for resentencing since it was consolidated for judgment with the conviction under 06 CRS 1603 that was already remanded. **State v. Hinson, 172.**

Possession of cocaine—motion to dismiss—motion to suppress not well grounded—The trial court did not err by denying defendant's motion to dismiss the charge of possession of cocaine. Defendant conceded that his motion was not well grounded if his motion to suppress was not granted, and no court overruled or reversed the denial of the motion to suppress. **State v. Johnson, 718.**

DRUGS—Continued

Possession with intent to sell or deliver—sufficient evidence—motion to dismiss properly denied—The trial court did not err in denying defendant juvenile's motion to dismiss the charge of possession with intent to sell or deliver marijuana as there was substantial evidence to support each element of the charge. **In re D.L.D., 434.**

Requested instruction—personal use exception—The trial court did not err by failing to give a requested instruction on excluding preparation for one's own use from manufacturing methamphetamine. The personal use exception was inapplicable to defendant's charge. **State v. Hinson, 172.**

Sufficient evidence—possession of ecstasy and ketamine—The trial court did not err in denying defendant's motion to dismiss charges of possession of ecstasy and possession of ketamine and to set aside the verdicts of guilty on those charges because there was substantial evidence of the essential elements of both crimes. Defendant's argument that she could not have been guilty of possessing both ecstasy and ketamine because the substances were contained in the same pill was not a question for the Court when considering the denial of the motion to dismiss. **State v. Hall, 712.**

EMPLOYER AND EMPLOYEE

Tortious interference with contract—termination—wrongful purpose—evidence sufficient—The trial court erred by granting defendants' motion for directed verdict on a claim for tortious interference with a contract by defendant Smith where plaintiff reported misconduct within the company to Smith and was later terminated. Plaintiff forecasted more than a scintilla of evidence that he was terminated for a wrongful purpose. **Combs v. City Elec. Supply Co., 75.**

Wrongful discharge—reporting misconduct to management—evidence sufficient—The trial court erred by granting defendants' motion for directed verdict on a claim for the wrongful discharge of an at will employee where the claim was based upon a retaliatory termination after plaintiff reported to management that the company was withholding negative account balance statements from customers, transferring the monies to a separate account, and continuing to invoice customers in violation of N.C.G.S. § 14-100 (obtaining property by false pretenses). **Combs v. City Elec. Supply Co., 75.**

EVIDENCE

Codefendant's conviction—admission not plain error—There was no plain error where the mother of a codefendant was allowed to testify that her son was serving his time for this matter. The State conceded error, but there was other, substantial evidence of defendant's guilt. The same reasoning applied to testimony elicited by defendant on cross-examination of the same witness; even if it was not invited error, its exclusion would not have changed the result. **State v. Wilson, 547.**

Cross-examination—exclusion of victim's prior failed drug test—trial court's comment—failure to make offer of proof—excluded as unfairly prejudicial—The trial court did not abuse its discretion in a second-degree rape, false imprisonment, and assault inflicting serious injury case by excluding evidence of the victim's failed drug test taken some time during the prior two years. Given the totality of the circumstances, the trial court's statement regarding

EVIDENCE—Continued

the exclusion did not reasonably have a prejudicial effect on the result of the trial and any error was harmless. Further, defendant did not present evidence regarding the victim's prior drug use, failed to make an offer of proof as to any further evidence that would establish a pattern of drug use, and the evidence was excluded as unfairly prejudicial under N.C.G.S. § 8C-1, Rule 403. **State v. McCravey, 627.**

Expert testimony—no notice in discovery—no prejudice—The trial court erred by allowing a witness to give expert testimony on the ingredients and effect of Narcan in a prosecution for second-degree murder and DWI. Based on testimony regarding the witness's qualifications and on the substance of his opinion, the witness provided expert testimony even though the State did not properly notify defendant during discovery that it intended to offer the witness as an expert. However, the error was harmless in light of the fact that the State presented sufficient evidence of malice beyond defendant's high blood-alcohol level and in light of the fact that the evidence was cumulative. **State v. Armstrong, 399.**

Guns—plain error to admit—relevancy—The trial court committed plain error in a double robbery with a dangerous weapon and assault with a deadly weapon case by admitting evidence of guns found in defendant's home. The guns were not relevant to the crimes charged because the victims' description of the gun used in the attack did not match either of the guns found in the closet, and neither witness identified either gun as the one used in the robbery. **State v. Samuel, 610.**

Hearsay—not plain error—Even assuming *arguendo* that the trial court erred in allowing into evidence hearsay testimony regarding defendant's pre-trial identification in a photographic lineup, in light of the State's evidence the jury probably would not have reached a different result had the error not occurred. **State v. Curry, 375.**

Lay opinion testimony of police officer—not plain error—The trial court did not commit plain error by allowing a police officer to testify about common practices in drug sales as the officer was testifying from personal experience and it was helpful to the jury in deciding whether marijuana found in defendant's possession was for sale. **In re D.L.D., 434.**

Police report—corroboration—actual possession of drugs—Although defendant contended the trial court erred in a felonious possession of cocaine case by admitting a portion of a computer generated copy of a police report as a prior consistent statement for the purpose of corroborating the arresting officer's testimony, its effect would not have been prejudicial even if erroneously admitted given the uncontradicted evidence of actual possession of cocaine by defendant. **State v. Johnson, 718.**

Prior crimes or bad acts—fatal variance with indictment—not shown—The trial court did not err by allowing a larceny victim to testify about other bad behavior by defendant during their relationship. Although defendant argued the testimony constituted evidence of other crimes that created a variance with the indictment, defendant failed to explain why the variance was fatal. **State v. Hager, 704.**

Prior crimes or bad acts—not plain error—The trial court did not commit plain error in allowing into evidence testimony that defendant had been incarcerated

EVIDENCE—Continued

shortly before the shooting and was on probation because the State presented substantial evidence of the crimes charged in this case and even if the testi-

mony was erroneously admitted, defendant failed to show that the jury probably would have reached a different result had the error not occurred. **State v. Curry, 375.**

Prior crimes or bad acts—violence against victims' mother—mother victim of sexual abuse—not plain error—The trial court did not commit plain error in a sexual offenses case by admitting into evidence testimony regarding defendant's violence against the mother of the two victims and testimony that the victims' mother had been a victim of sexual abuse as a child. The evidence was relevant and probative of issues in the case and even if the evidence was erroneously admitted, defendant failed to show that the jury would have reached a different result absent the error. **State v. Espinoza-Valenzuela, 485.**

FIREARMS AND OTHER WEAPONS

Possession of firearm by felon—motion to dismiss—sufficiency of evidence—constructive possession—The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm. The evidence was sufficient to permit a reasonable jury to infer that defendant constructively possessed a handgun found in the undergrowth roughly 25 to 30 feet from the door to defendant's cabin. **State v. Taylor, 448.**

HOMICIDE

Felony murder—merger—conviction arrested—sentence imposed not prejudicial—The trial court erred by not merging defendant's robbery conviction into his conviction for first-degree murder and defendant's robbery conviction was arrested. However, defendant was not prejudiced as the felony upon which defendant's murder conviction was based was the robbery and the trial court consolidated the two convictions and imposed a life sentence, which was required for the murder conviction. **State v. Curry, 375.**

Felony murder—sufficient evidence—motion to dismiss properly granted—The trial court did not err by denying defendant's motion to dismiss robbery and murder charges as the State presented sufficient evidence of each element of the crimes. **State v. Curry, 375.**

First-degree murder—jury instructions—duress and second-degree murder—no error—The trial court did not err in a first-degree murder trial by not instructing the jury on the defense of duress or the lesser-included offense of second-degree murder. Defendant was found guilty of first-degree murder on the basis of premeditation and deliberation, and duress is not a defense to first-degree murder under these theories. Moreover, the State pursued only a theory of first-degree murder and defendant was not entitled to an instruction on second-degree murder merely because the jury might not have believed all of the State's evidence. **State v. Clodfelter, 60.**

Imperfect self-defense—instruction refused—The trial court did not err by refusing to instruct the jury on voluntary manslaughter under a theory of imperfect self-defense where there was no evidence that defendant believed it

necessary to kill the decedent in order to save himself from death or great bodily harm. The evidence clearly indicated that defendant initiated a fight, defendant

HOMICIDE—Continued

was determined to win the fight, and defendant fired his gun in order to get away. **State v. Cruz, 230.**

IMMUNITY

Governmental—public duty doctrine—summary judgment—The trial court erred in denying defendant City of Charlotte's motion for summary judgment on plaintiff's negligence claims. The public duty doctrine barred plaintiff's claims that city police officers were negligent in failing to summon medical assistance for her husband who appeared to be physically impaired in some respect. The officers were providing police protection to the general public, made a discretionary decision causing indirect harm to the individual, and had no duty to summon medical help, especially when the individual declined assistance. Moreover, no exceptions to the public duty doctrine were applicable. **Scott v. City of Charlotte, 460.**

Governmental—waiver—county medical examiner—insurance purchased by DHHS—In an action against a county medical examiner appointed by the Department of Health and Human Services (DHHS), the proper forum for the case is the Industrial Commission even if DHHS has purchased liability insurance. The case is controlled by *Wood v. N.C. State Univ.*, 147 N.C. App. 336, and plaintiffs did not state a claim for relief in superior court against the medical examiner in his official capacity. **Green v. Kearney, 260.**

Governmental—county medical examiner—sued in official capacity—The trial court erred by denying a county medical examiner's Rule 12(b)(6) motion to dismiss a claim against him in his official capacity where the State had not consented to being sued in superior court. To bring the State in as a third-party, the action must have originated in superior court against a defendant not protected by official sovereign immunity. **Green v. Kearney, 260.**

Governmental—waiver—allegation—particular language not required—Plaintiffs sufficiently alleged a waiver of sovereign immunity in a suit against a medical examiner where the allegation was that the State had waived immunity "by statute." No particular language is required in the complaint to allege waiver of sovereign immunity. **Green v. Kearney, 260.**

INDICTMENT AND INFORMATION

Habitual felon—date of one offense corrected—The trial court did not err by allowing the State to alter an indictment for being an habitual felon after the close of the evidence where the bill listed the date of one of the offenses incorrectly. Defendant did not argue that the typographical error in some way misled or surprised him. **State v. Hager, 704.**

Motion to amend—habitual felon—date of commission of prior felony—The trial court did not err by granting the State's motion to amend defendant's habitual felon indictment under N.C.G.S. § 14-7.3 regarding the date defendant committed a prior possession with intent to sell or deliver marijuana felony. The

date was neither an essential nor a substantial fact for the habitual felon charge. **State v. Taylor, 448.**

INDICTMENT AND INFORMATION—Continued

Variance—plain error—The trial court committed plain error by instructing the jury that they could find defendant guilty of manufacturing methamphetamine under theories of guilt that were in variance from the indictment. Defendant was granted a new trial on 06 CRS 1602 for manufacture of a controlled substance. **State v. Hinson, 172.**

Variance—possession of firearm by felon—habitual felon—date of prior felony not essential element—The trial court did not err by denying defendant's motion to dismiss the charges of possession of a firearm by a felon and attaining the status of a habitual felon based on a variance in the indictments. The date a defendant committed a prior felony was not an essential element of either charge, and thus the discrepancy of dates in the indictments was not a fatal variance. **State v. Taylor, 448.**

Variance—warrant and evidence—not material—There was not a fatal variance between the warrant and the State's evidence in a prosecution for assaulting a government officer where defendant contended that he was arrested for being intoxicated and disruptive in public, while the warrant asserted that he was arrested for communicating threats. Whether the arrest was for communicating threats or for being intoxicated and disruptive was immaterial. Moreover, defendant was charged with both offenses and clearly had notice of all of the charges against him. **State v. Roman, 730.**

INSURANCE

Automobile—duty to defend—The trial court did not err in declaring that defendant insurance company had a duty to defendant plaintiff in a wrongful death action brought by the estate of a deceased employee because the employee exclusion clause of the automobile insurance policy at issue did not bar coverage under the facts of the case. **Huber Engineered Woods, LLC v. Canal Ins. Co., 1.**

Automobile—duty to defend—insured—policy terms ambiguous—Defendant's argument that the term "because of" acts or omissions required a finding of proximate cause and limited defendant's duty to defend to instances of vicarious liability was overruled. The term was, at a minimum, ambiguous and therefore interpreted in favor of coverage. Because plaintiff's alleged liability could have arisen from an act or omission on the part of the insured under the policy, it was sufficient to trigger defendant's duty to defend. **Huber Engineered Woods, LLC v. Canal Ins. Co., 1.**

Automobile—duty to defend—insured—policy terms ambiguous—Plaintiff was an "insured" under the terms of an automobile insurance policy because plaintiff was facing liability because of "acts or omissions" of an employee of a named insured. Defendant's argument that the language "acts or omissions" necessarily meant "*negligent* acts or omissions" was overruled. The policy did not require negligence on the part of the named insured or its employees for plaintiff to be an "insured." **Huber Engineered Woods, LLC v. Canal Ins. Co., 1.**

Automobile—duty to indemnify—summary judgment—The trial court erred in deciding on summary judgment the issue of defendant insurer's duty to indemnify plaintiff because an insurer may not litigate its duty to indemnify until the

liability of the insured has been determined, and plaintiff's liability in this case had not been determined when the action was filed. **Huber Engineered Woods, LLC v. Canal Ins. Co., 1.**

INSURANCE—Continued

Automobile insurance contract—applicable law—The substantive law of Maine applied to a breach of contract case between a North Carolina building products manufacturer and an insurance company because the last act to make the automobile insurance contract binding occurred in Maine. **Huber Engineered Woods, LLC v. Canal Ins. Co., 1.**

Homeowners—rate increase—failure to include requisite findings—Appellants' appeal from an order of the North Carolina Commissioner of Insurance approving a statewide overall increase in homeowners' insurance rates, with changes varying by form and territory, was dismissed. Under the statutory ratemaking procedure of N.C.G.S. § 58-2-80, the Court of Appeals cannot assume jurisdiction over any order of the Commissioner that does not include the requisite findings in a contested hearing. **State ex rel. Comm'r of Ins. v. Dare Cnty., 556.**

JURISDICTION

Subject matter jurisdiction—controversy not ripe—inverse condemnation—The superior court lacked subject matter jurisdiction over plaintiff's action seeking compensation under a theory of inverse condemnation. Neither of the prerequisite events had occurred at the time plaintiff filed its claim, there had been no taking, and there was no concrete controversy ripe for adjudication. **Cary Creek Ltd. P'ship v. Town of Cary, 99.**

JURY

Submission of issues—abuse of discretion standard—The trial court did not err by submitting the second, fifth, and eighth issues to the jury in a conspiracy and conversion case. No evidence in the record showed that the trial court abused its discretion by submitting these questions to the jury. **Mace v. Pyatt, 245.**

LARCENY

Intent to permanently deprive—evidence sufficient—The trial court did not err by denying defendant's motion to dismiss larceny for insufficient evidence where defendant contended that the victim was not truthful when she testified that jewelry was taken from her home without permission, but pointed to no evidence contrary to the victim's testimony. The fact that defendant pawned these items and had redeemed other pawned items in the past only showed that he did not intend to deprive *himself* of the property permanently. **State v. Hager, 704.**

Possession of stolen goods—consolidation of judgments—The trial court erred by entering judgment against defendant for both larceny and possession of stolen goods. Although the trial court consolidated the judgments for sentencing, it has been specifically held that consolidation does not cure the error. **State v. Hager, 704.**

MEDICAL MALPRACTICE

Failure to detect child abuse—follow-up visits—Plaintiffs forecasted sufficient evidence against Dr. Jones and Cape Fear Orthopaedic Clinic to withstand

summary judgment in a medical malpractice action claiming that failure to detect child abuse led to further injuries. These defendants were the medical providers who saw the child during four follow-up visits. **Gaines v. Cumberland Cnty. Hosp. Sys., Inc., 213.**

MEDICAL MALPRACTICE—Continued

Failure to detect child abuse—hospital employees—issue of fact—Summary judgment was incorrectly granted for defendant Cape Fear Valley on a claim that its employees failed to detect signs of child abuse which proximately caused a subsequent injury. There was an issue of fact in that plaintiffs submitted evidence from a doctor and a nurse asserting that defendant's employees breached the standard of care while a DSS investigator testified that no investigation would have followed a report from defendant's employees. **Gaines v. Cumberland Cnty. Hosp. Sys., Inc., 213.**

Failure to detect child abuse—not reviewing x-ray report or personally taking history—Plaintiffs forecasted sufficient evidence against Dr. Tetzlaff to withstand summary judgment on a medical malpractice claim arising from the failure to detect child abuse. There was evidence that Dr. Tetzlaff did not review an x-ray report and did not personally take a history. **Gaines v. Cumberland Cnty. Hosp. Sys., Inc., 213.**

Failure to detect child abuse—radiologist—summary judgment—Plaintiffs forecasted sufficient evidence against defendants Dr. Davis and Regional Radiology to withstand summary judgment in a medical malpractice claim arising from the failure to detect child abuse and a subsequent injury. Dr. Davis did not notify DSS of potential child abuse or inform any other physician or nurse about the suspicious findings. **Gaines v. Cumberland Cnty. Hosp. Sys., Inc., 213.**

Failure to detect child abuse—testimony not speculative—The expert testimony in a medical malpractice case arising from the failure to detect child abuse was based on facts rather than speculation and, viewed in the light most favorable to plaintiffs, was sufficient to withstand summary judgment. Testimony about what DSS would have done had a report been made earlier came from a physician with a long-standing relationship to DSS and expertise in its policies. **Gaines v. Cumberland Cnty. Hosp. Sys., Inc., 213.**

Motion for a new trial—improperly granted—The trial court abused its discretion in granting plaintiff's motion for a new trial in a medical malpractice action. The trial court's order contained 11 findings of fact pertaining to the evidence presented at trial, only one of which referred to defendants' evidence and which omitted any reference to defendants' expert witness who testified as to the applicable standard of care. Moreover, the trial court did not identify any "unreliable testimony" submitted by defendants. **Langwell v. Albemarle Family Practice, PLLC, 666.**

Rule 9(j)—statement not supported by facts—summary judgment—The trial court did not err by granting summary judgment for defendants in a medical malpractice case where plaintiff's complaint facially complied with Rule 9(j), but discovery subsequently established that the expert statement was not supported by the facts. **Campbell v. Duke Univ. Health Sys., Inc. 37.**

MOTOR VEHICLES

Driving while impaired—driver's license checkpoint—motion to suppress

evidence—reasonable articulable suspicion—The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence obtained from his car during a driver's license checkpoint. The primary programmatic purpose of the checkpoint was lawful and reasonable. Under the totality of

MOTOR VEHICLES—Continued

circumstances, the officer had reasonable articulable suspicion to detain defendant regarding the contents of an aluminum can after it was determined to contain an alcoholic beverage. **State v. Jarrett, 675.**

Felony speeding to elude arrest—driving while license revoked—motion to dismiss—sufficiency of evidence—Although the trial court did not err by denying defendant's motion to dismiss the charge of felony speeding to elude arrest, it erred by denying his motion to dismiss the crime of driving while license revoked based on insufficient evidence as conceded by the State in its brief. **State v. Graves, 123.**

Felony speeding to elude arrest—pattern jury instruction—The trial court did not err or commit plain error by using the pattern jury instruction for felony speeding to elude arrest even though defendant contended it contained a lower standard of knowledge than that required by the statute. The instruction merely allowed the jury to find either actual knowledge or implied knowledge that the officer in question was a law enforcement officer. **State v. Graves, 123.**

Storage fee for recovered stolen motorcycles—not excessive—The trial court did not abuse its discretion by denying defendant's motion to set aside or remit the jury verdict on the argument that an award was excessive in an action for storage fees for stolen motorcycles and parts seized by the State. Although the State argued that it should be liable for storage costs only up to the filing date for the dispositional actions, the motorcycles and parts remained in storage far beyond that date and there was no evidence of a difference in storage or benefit to defendant before and after that date. **Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles, 19.**

Storage fee for recovered stolen motorcycles—not limited to value of vehicle—Plaintiff's recovery for storing stolen motorcycles and parts seized by the State was not limited by N.C.G.S. § 20-108(j) to the value of the parts and vehicles. The Legislature intended that a private garage recover reasonable compensation for services related to seizure under N.C.G.S. § 20-108 as a separate remedy from lienor rights. There is nothing in the statute or legislative history to indicate that the qualification of compensation as reasonable should tie the storage charge to the value of the vehicle. **Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles, 19.**

NEGLIGENCE

Admissions—affirmative defense—The trial court did not err by denying plaintiff's motion for a directed verdict in a traffic accident case where plaintiff contended that defendant's admissions established defendant's negligence. **Henry v. Knudsen, 510.**

Instructions—objections not specific—There was no error in the jury instructions given in an automobile accident case when the parties stipulated in the record that plaintiff objected to the instructions, but the transcript did not

show an objection by plaintiff and the stipulation did not specify the content of the objection. Even so, the record did not contain any request for alternative instructions and the court accurately instructed the jury on the relevant law. **Henry v. Knudsen, 510.**

NEGLIGENCE—Continued

Insufficient evidence of a duty—summary judgment—The trial court did not err in granting summary judgment in favor of defendant City of Hickory on plaintiff's negligence claim because plaintiff failed to offer sufficient evidence that defendant owed plaintiff any duty to inspect or maintain a storm drainage pipe on plaintiff's property. **First Gaston Bank of N.C. v. City of Hickory, 195.**

Motion to dismiss—failure to supervise patient—Rule 9(j) certification not required—The trial court erred by granting defendant's motion to dismiss plaintiff's complaint based on its failure to include Rule 9(j) certification. Plaintiff's complaint alleging that defendant's failure to supervise a patient recently treated with seizures until a responsible adult was able to care for him was a claim of ordinary negligence rather than a claim for medical malpractice in furnishing or failure to furnish professional services in the performance of medical or other health care by a health care provider. **Allen v. Cnty. of Granville, 365.**

Sudden incapacitation—defendant's credibility—The trial court did not err by denying plaintiff's motion for judgment notwithstanding the verdict and a new trial in a case arising from an automobile accident in which plaintiff raised the affirmative defense of sudden incapacitation. **Henry v. Knudsen, 510.**

Sudden incapacitation—evidence sufficient—The trial court did not err by denying plaintiff's motion for a directed verdict at the close of all of the evidence in a car accident case in which defendant raised the affirmative defense of sudden incapacitation. Defendant's credibility was for the jury to decide. **Henry v. Knudsen, 510.**

PHYSICIANS

Medical examiner—individual capacity—failure to examine—not malicious or corrupt—Plaintiffs did not state a claim which could be granted against a county medical examiner in his individual capacity where plaintiffs' allegations did not support the assertion that the medical examiner's actions were in bad faith or were willful, wanton, corrupt, malicious, or recklessly indifferent. Upon arriving at the scene of an accident where an individual has been declared dead, the medical examiner is not required by statute to conduct his or her own examination, but need only take charge of the body. **Green v. Kearney, 260.**

POSSESSION OF STOLEN PROPERTY

Property hidden—insufficient evidence—The trial court erred by denying defendant's motion to dismiss the charge of felony possession of stolen goods where a stolen shotgun used in the commission of a robbery was hidden by the codefendant in his mother's home. The evidence was not sufficient to establish that defendant knew or had reasonable grounds to believe that the gun was stolen. **State v. Wilson, 547.**

PREMISES LIABILITY

Contributory negligence—known danger—The trial court did not err in a slip and fall case by granting summary judgment in favor of defendant corporation based on its defense of contributory negligence. Both the sidewalk curb where the victim parked or the lack of a properly handicapped sanctioned route, even if either was an obvious defect or danger, were easily discoverable or likely to be known by the victim. **Kelly v. Regency Ctrs. Corp.**, 339.

PUBLIC ASSISTANCE

Medicaid—resource limits—unknown insurance policies—The trial court did not err by concluding that the available resources of an Alzheimer's patient were in excess of the allowable Medicaid reserve limit when she began receiving benefits where it was discovered that she had two insurance policies which her children, who held her power of attorney, had not known about when benefits began. Neither the North Carolina Administrative Code nor the Medicaid Manual require that financial resources be known, only that they be available. **Cloninger v. N.C. Dep't of Health & Human Servs.**, 345.

PUBLIC OFFICERS AND EMPLOYEES

Appointed county medical examiner—public officer—An appointed county medical examiner was a public officer of the State. **Green v. Kearney**, 260.

PUBLIC RECORDS

Request—trial preparation materials—not subject to inspection—The trial court did not abuse its discretion by denying plaintiff the opportunity to inspect certain records it had requested from the City of Charlotte under the Public Records Act because the documents contained mental impressions, conclusions, opinions, or legal theories of City attorneys or other agents of the City that had been prepared in reasonable anticipation of litigation. **Wallace Farm, Inc. v. City of Charlotte**, 144.

REAL PROPERTY

Inverse condemnation—summary judgment proper—The trial court properly granted summary judgment in favor of defendant City of Hickory on plaintiff's inverse condemnation claim because plaintiff failed to show that the flooding of plaintiff's storm drain pipe was a direct result of a government structure. **First Gaston Bank of N.C. v. City of Hickory**, 195.

SEARCH AND SEIZURE

Issuance of warrant—probable cause—staleness of evidence—The trial court did not err in a manufacturing methamphetamine and possession of precursor chemicals case by determining that probable cause existed to support the issuance of a search warrant. The magistrate considered not only the three week old evidence given by an informant, but also observations made just one day before the warrant application was submitted, as well as a lieutenant's opinion based on his experience that an ongoing methamphetamine production operation was present. **State v. Hinson**, 172.

Issuance of warrant—probable cause—totality of circumstances—The trial court did not err in a manufacturing methamphetamine and possession of precursor chemicals case by denying defendant's motion to suppress the evidence obtained by the execution of a search warrant. Based on the totality of circumstances and giving great deference to the magistrate's determination,

there was sufficient evidence to support a conclusion of probable cause. **State v. Hinson, 172.**

Juvenile student—reasonableness standard—motion to suppress properly denied—The trial court did not err in denying defendant's motion to suppress evidence discovered in defendant's possession as a result of a search of defendant's person. The reasonableness standard applied to the search of defendant,

SEARCH AND SEIZURE—Continued

a juvenile student; the facts showed that the search of the juvenile was justified at its inception and was not unnecessarily intrusive in light of the juvenile's age and gender and the nature of his infraction. **In re D.L.D., 434.**

Motion to suppress evidence—methamphetamine lab—precursor chemicals—The trial court did not err in a manufacturing methamphetamine and possession of precursor chemicals case by denying defendant's motion to suppress evidence found during the search of his house. The sworn information was competent evidence to support a finding that the equipment and materials observed by an informant were of the type that would be present in a methamphetamine lab that was an ongoing operation that was long term in nature. **State v. Hinson, 172.**

Motion to suppress—reasonable suspicion—traffic violation—informant tip—The trial court did not err in a drugs case by denying defendant's motion to suppress evidence obtained as a result of a traffic stop. An officer had the required reasonable suspicion to stop defendant based on his observation of defendant committing a traffic violation, and alternatively, based on a tip received from a reliable confidential informant. **State v. McRae, 319.**

Outbuilding within curtilage—motion to suppress—consent—The trial court did not err in a manufacturing methamphetamine case by denying defendant's motion to suppress evidence from the search of an outbuilding within the curtilage of the residence after he consented to a search of his property. The search was within the scope of defendant's consent. **State v. Hagin, 561.**

SENTENCING

Consecutive sentences—not grossly disproportionate—Defendant's original sentence of 57.5 to 71.25 years in prison for convictions of multiple sexual offenses, and his reduced sentence of 40 to 49.5 years in prison resulting from the trial court's granting of his motion for appropriate relief, did not violate the Eighth Amendment to the United States Constitution. Defendant failed to show that the trial court abused its discretion either in imposing three consecutive sentences within the presumptive range originally, or in reducing the overall time that defendant would serve for two consecutive sentences within the presumptive range. **State v. Espinoza-Valenzuela, 485.**

Discharging a firearm into an occupied dwelling—clerical error—The trial court did not err in sentencing defendant for a Class D rather than a Class E felony for his conviction of discharging a firearm into occupied property. The terms "dwelling" and "residence" are synonymous in the context of this case and the indictment and the jury instructions were sufficient to charge defendant with a Class D felony under N.C.G.S. § 14-34.1(b). Defendant's judgment was remanded for correction of a clerical error. **State v. Curry, 375.**

Lengthy sentence—force not used in crime—delay in reporting— There was no plain error in sentencing defendant where his argument was essentially that the sentence seemed too long, not that the term was incorrect under the statutory guidelines, or that defendant should not have been classified as a habitual felon. A lack of force in the commission of the crimes and the delay of the victim reporting the crimes did not rise to the level of grievous error outlined in *State v. Todd*, 313 N.C. 110. **State v. Hager, 704.**

SENTENCING—Continued

Motion for appropriate relief granted—no prejudicial error— Defendant's argument that the trial court did not have jurisdiction to grant defendant's motion for appropriate relief and reduce defendant's overall sentence in a sexual offenses case was overruled as defendant was not prejudiced by the granting of relief which he sought. **State v. Espinoza-Valenzuela, 485.**

Possession of two controlled substances in a single pill—no error— The trial court did not err by entering sentences for both possession of ecstasy and possession of ketamine when both controlled substances were contained in a single pill. The double jeopardy protections of the Fifth Amendment were not implicated and any amount of ecstasy and any amount of ketamine found in defendant's possession was sufficient to charge defendant with possession of both controlled substances. **State v. Hall, 712.**

Prior record level—use of prior convictions— There was no error in calculating defendant's prior record level where defendant's arguments did not specify which of several dozen prior convictions he believed were not fully proven or were counted twice. Furthermore, defendant expressly stipulated his prior record level in an extended colloquy and the question of which convictions were used for which purpose was considered at that hearing. **State v. Hager, 704.**

Prior record points—out-of-state convictions— The trial court did not erroneously assign prior record points to out-of-state convictions where defendant had three driving under the influence convictions in Alabama. The trial court concluded that the Alabama offenses were substantially similar to the DWI provisions in the North Carolina statutes. **State v. Armstrong, 399.**

Reasonable inference—impermissibly based on defendant's insistence on jury trial— It could be reasonably inferred from the trial court's statements that it impermissibly sentenced defendant based, at least in part, on defendant's decision to refuse the State's plea offer. Defendant was entitled to a new sentencing hearing. **State v. Haymond, 151.**

Resentencing—appeal of right—minimum sentence determinative— Defendant had no appeal as a matter of right from a sentence for second-degree kidnapping that was at the top of the presumptive range after the court found one mitigating factor and no aggravating factors. It is defendant's minimum sentence that determines whether N.C.G.S. § 15A-144(a) is applicable; here, defendant's minimum sentence was within the presumptive range even though the maximum term entered the aggravated range. Defendant did not petition for *certiorari*. **State v. Daniels, 350.**

Resentencing—more severe term— The trial court erred when resentencing defendant for first-degree rape by imposing a sentence that exceeded the original term. Although the State argued that the court should consider defendant's sentences in the aggregate, the plain language of N.C.G.S. § 15A-1335 states that

the trial court may not impose a more severe sentence for the same offense. There is no indication that the statute was altered by the passage of the Structured Sentencing Act. **State v. Daniels, 350.**

SEXUAL OFFENDERS

Failing to register—failing to verify address—The trial court erred by denying defendant's motion to dismiss the charge of failing to register as a sex offender

SEXUAL OFFENDERS—Continued

by failing to verify his address. Uncontroverted evidence showed that defendant never received the semi-annual verification form. Further, if a defendant is not found at the registered address, the crime to be charged is failure to report a change of address under N.C.G.S. § 14-208.9A(a)(4). **State v. Braswell, 736.**

Satellite-based monitoring—aggravated offense—second-degree rape—The trial court did not err by ordering that defendant enroll in lifetime satellite-based monitoring after finding that defendant had been convicted of an aggravated offense under N.C.G.S. § 14-208.6(1a) through the use of force or the threat of serious violence. The term "aggravated offense" was not unconstitutionally vague, and defendant was convicted of second-degree rape. **State v. McCravey, 627.**

SEXUAL OFFENSES

Satellite-based monitoring—finding of aggravated offenses—error—The trial court erred in finding that defendant's convictions for taking indecent liberties with a child pursuant to N.C.G.S. § 14-202.1 and felonious child abuse by the commission of any sexual act pursuant to N.C.G.S. § 14-318.4(a2) were "aggravated offenses" as defined in N.C.G.S. § 14-208.6(1a). Thus, the trial court erred in ordering defendant to enroll in a lifetime satellite-based monitoring program. **State v. Phillips, 326.**

Sufficient evidence—motion to dismiss properly denied—The trial court did not err in denying defendant's motion to dismiss charges of first-degree statutory rape, first-degree statutory sexual offense, and taking indecent liberties with two minors as the evidence, viewed in the light most favorable to the State, was sufficient to support the charges. **State v. Espinoza-Valenzuela, 485.**

STATUTES OF LIMITATION AND REPOSE

Breach of fiduciary duty and conversion of corporate property—continuing wrong doctrine—The trial court erred in determining that plaintiffs' complaint alleging breach of fiduciary duty and conversion of corporate property established that the claims were barred by the three year statute of limitations. Plaintiff Marzec's claims based on defendant Nye's failure to pay plaintiff's salary and to provide an accounting were timely under the continuing wrong doctrine. The complaint did not contain allegations establishing that the statute of limitations had run on plaintiff's claims based on defendant's obtaining a personal loan in the company's name, payment of the loan from corporate funds, or usurping a corporate opportunity. Plaintiff's claim based on defendant's failure to produce corporate records was time barred. **Marzec v. Nye, 88.**

Untimely federal claim—bar to state claim—childhood vaccine-related injury—A *de novo* review revealed the Industrial Commission erred in a case regarding the causation of a child's mental retardation and the timeliness of plaintiffs' claim for compensation under the federal and state childhood

vaccine related injury compensation programs by holding that plaintiffs' claims were not barred by the state statute of limitations under N.C.G.S. § 130A-129(c). Plaintiffs' failure to file a timely federal petition under 42 U.S.C. § 300aa-16(a)(2) barred them from bringing an action under the state program. **Goetz v. N.C. Dep't of Health & Human Servs.**, 421.

TERMINATION OF PARENTAL RIGHTS

Adjudication—findings of fact supported—The trial court's findings of fact supporting its conclusion of law that grounds existed to terminate respondent father's parental rights under N.C.G.S. § 7B-1111(a)(5) were supported by clear, cogent, and convincing evidence. Furthermore, nothing in respondent's version of the facts showed that respondent, a minor, or his family provided substantial financial support or consistent care to the mother during her pregnancy. **In re A.C.V.**, 473.

Grounds—constitutionally protected status as a parent—The trial court did not err in concluding that a ground existed to terminate respondent father's parental rights under N.C.G.S. § 7B-1111(a)(5), and under *Owenby v. Young*, 357 N.C. 142 (2003), respondent's constitutionally protected status as the juvenile's natural parent was properly removed by the trial court. **In re A.C.V.**, 473.

Jurisdiction—standing—licensed child-placing agency—father's consent not required—The trial court did not err in exercising subject matter jurisdiction over an action to terminate respondent father's parental rights because petitioner, a licensed child-placing agency to which the juvenile was surrendered by his mother, had standing to file a petition to terminate respondent's parental rights and respondent's consent was not required for the relinquishment. **In re A.C.V.**, 473.

Late service of notice—timeliness of hearing—harmless error—The trial court did not err by terminating respondent mother's parental rights. There was no indication that respondent was in any way prejudiced by the fact that notice of the 8 July 2009 hearing was sent on 18 June 2009 instead of 17 May 2009. A failure to mechanically comply with N.C.G.S. § 7B-1106.1 is subject to harmless error analysis. Further, respondent waived the right to object to any deficiencies based on the failure of her trial counsel to lodge a notice based objection during the course of that hearing. Finally, although the hearing started at 12:17 pm instead of 9:00 am as listed on the notice, there was no indication that respondent appeared at the specified time or at any other time, and the record suggested the timing was to accommodate her trial counsel's scheduling conflicts. **In re T.D.W.**, 539.

TORT CLAIMS ACT

Claim not added to superior court claims—Plaintiffs were not allowed to maintain an action against a medical examiner in superior court along with other claims against the county and its employees in the interests of judicial economy, where plaintiff had already filed a claim against the State in the Industrial Commission, so that two actions already existed. Moreover, the Tort Claims Act sets out the parameters of the State's waiver of sovereign immunity, and the Court of Appeals cannot set aside statutory restrictions even in the name of judicial economy. **Green v. Kearney**, 260.

TRUSTS

Accounting—information reasonably necessary to enforce rights—The trial court erred by granting a protective order in favor of defendants that effectively denied plaintiffs' request for an accounting of the pertinent trusts even though a provision of the trust instrument purportedly excused the trustee from providing an accounting. N.C.G.S. § 36C-8-813 does not override the duty of the trustee to act in good faith, nor can it obstruct the power of the court to take

TRUSTS—Continued

such action as may be necessary in the interests of justice. The trial court's grant of summary judgment and award of costs to defendants was reversed. **Wilson v. Wilson**, 45.

Distribution of corpus—settlor's intention—The trial court did not err in a declaratory judgment action to interpret a trust by determining that the settlor intended that the corpus of the trust remaining after 99 years should be distributed equally among the then entitled charitable beneficiaries of the trust, rather than among the residuary beneficiaries of the estate. **First Charter Bank v. Am. Children's Home**, 574.

Virtual representation of estate—no conflict of interest—The trial court did not err when it found no conflict of interest between estates represented in an action to interpret a trust and another estate virtually represented by those estates where there was no evidence to support such an assertion. **First Charter Bank v. Am. Children's Home**, 574.

Virtual representation of estate—substantially similar to other estates—The trial court did not err in a declaratory judgment action to interpret a trust by determining that three other estates could represent a missing estate. The respondent-appellant did not provide any argument as to how the estates involved differed in terms relevant to the question before the trial court. **First Charter Bank v. Am. Children's Home**, 574.

Virtual representative of estate—not found—The trial court did not err in a trust matter when it found that the petitioner trustee was not able to locate a person willing to re-open one of the estates involved or to serve as a representative. While a nephew-by-marriage filed a "Suggestion of Want of Jurisdiction," neither he nor anyone else actually sought to be named as personal representative of that estate. **First Charter Bank v. Am. Children's Home**, 574.

UNFAIR TRADE PRACTICES

Employment dispute—not an unfair or deceptive trade practice—The trial court did not err by granting defendants' motion for a directed verdict on plaintiff's claim for unfair and deceptive trade practices after an alleged retaliatory firing. The case involved a simple employment dispute and did not fall within the purview of N.C.G.S. § 75-1.1. **Combs v. City Elec. Supply Co.**, 75.

Summary judgment—failure to produce material facts—The trial court did not err by granting summary judgment in favor of defendants on an unfair and deceptive trade practices claim. The uncontroverted evidence showed that plaintiff received a proper title for an automobile shortly after purchase, and for reasons unexplained in the record, a new title was not issued from the South Carolina Division of Motor Vehicles. **Ahmadi v. Triangle Rent A Car, Inc.**, 360.

VENUE

Motion to change—improperly denied—The trial court erred by denying defendants' motion to change venue because N.C.G.S. §§ 1-77 and 1-79 were not applicable and none of the parties resided in Dare County at the commencement of the action. The trial court was required to order a change of venue as demand was properly made and the action was brought in the wrong county. **Caldwell v. Smith, 725.**

VENUE—Continued

Motion to change—properly granted—The trial court did not err in granting defendant's motion for a change of venue from Wake County to Caldwell County because defendants were public officers and the cause of action arose in Caldwell County. Moreover, consent to conduct arbitration proceedings in Wake County did not constitute consent to that venue for any judicial proceedings. **Pay Tel Commc'ns, Inc. v. Caldwell Cnty., 692.**

WORKERS' COMPENSATION

Compensability—accident not arising out of employment—The Industrial Commission did not err in finding and concluding that plaintiff employee's fall was noncompensable because the evidence supported the findings of fact and the findings supported the conclusion of law that plaintiff's injury was due solely to an "idiopathic condition" and did not arise out of his employment. Plaintiff's argument that the Commission erred in finding that plaintiff's fall was caused by his heart condition was misguided as the Commission did not make such a finding. **Watkins v. Trogdon Masonry, Inc., 289.**

Evidence—best evidence rule—The Industrial Commission did not err by allowing into evidence the transcript of plaintiff's recorded statement made to defendant's insurance adjuster instead of the original recording pursuant to N.C.G.S. § 8C-1, Rule 1003. The insurance adjuster fully authenticated the transcription of the statement and also testified to her own, independent recollection of the statement. **Watkins v. Trogdon Masonry, Inc., 289.**

Injury by accident—Achilles tendon injury—no unusual or unforeseen circumstances—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's Achilles tendon injury was not a compensable injury by accident. There were no unusual or unforeseen circumstances that interrupted plaintiff's work routine. **Gray v. RDU Airport Auth., 521.**

ZONING

WORD AND PHRASE INDEX

ABATEMENT

Pending federal lawsuit, **State of N.C. Dep't of Health & Human Servs. v. Armstrong**, 116.

ACCOUNTING

Trusts, **Wilson v. Wilson**, 45.

ADOPTION

Subject matter jurisdiction, **Norris v. Norris**, 566.

AGGRAVATED OFFENSE

Satellite-based monitoring, **State v. McCravey**, 627.

ALFORD PLEA

Motion to withdraw, **State v. Chery**, 310.

APPEALS

Dismissed without prejudice to seek motion for appropriate relief, **State v. Johnson**, 718.

Failure to argue, **Ahmadi v. Triangle Rent A Car, Inc.**, 360.

Failure to argue, **State v. Hagin**, 561.

Failure to cite authority, **Dunton v. Ayscue**, 356.

Failure to object, **Mace v. Pyatt**, 245.

ASSAULT

In secret, **State v. Holcombe**, 530.

Plain error to admit guns, **State v. Samuel**, 610.

ASSAULT ON A GOVERNMENT OFFICIAL

Push, **State v. Roman**, 730.

BREACH OF CONTRACT

No recovery for grading work for unlicensed contractor, **Lato Holdings, LLC v. Bank of N.C.**, 332.

BREACH OF CONTRACT

—Continued

Summary judgment, **Ahmadi v. Triangle Rent A Car, Inc.**, 360.

BREACH OF WARRANTY

Summary judgment, **Ahmadi v. Triangle Rent A Car, Inc.**, 360.

CHILD ABUSE

Failure to detect, **Gaines v. Cumberland Cnty. v. Hosp. Sys., Inc.**, 213.

CHILD DEPENDENCY

Parent with mental health issues and children with special needs, **In re T.B., C.P., & I.P.**, 497.

CHILD NEGLECT

Cessation of reunification efforts, **In re A.S.**, 140.

Fitness and availability to care for child, **In re A.S.**, 140.

Improper to leave allegation undecided, **In re T.B., C.P., & I.P.**, 497.

Placement with maternal grandmother, **In re K.J.D.**, 653.

Reasonable efforts at reunification, **In re A.S.**, 140.

CHILD VISITATION

Minimum outline of plan required, **In re T.B., C.P., & I.P.**, 497.

CIVIL PROCEDURE

Depositions permissible at summary judgment, **First Gaston Bank of N.C. v. City of Hickory**, 195.

Judge erroneously reconsidered legal conclusion of another judge, **Adkins v. Stanly Cnty. Bd. of Educ.**, 642.

Two dismissal rule, **Dunton v. Ayscue**, 356.

COCAINE

Motion to suppress, **State v. Johnson**, 718.

CODEFENDANT

Evidence of conviction, **State v. Wilson**, 547.

COMPENSATORY DAMAGES

Sufficiency of evidence of amount, **Mace v. Pyatt**, 245.

CONFESSIONS AND INCRIMINATING STATEMENTS

Bruton violation, **State v. Clodfelter**, 60.

Motion to suppress denied, **State v. Clodfelter**, 60.

CONSPIRACY

Compensatory and punitive damages, **Mace v. Pyatt**, 245.

CONSTRUCTION CLAIMS

Unlicensed contractor, **Lato Holdings, LLC v. Bank of N.C.**, 332.

CONSTRUCTIVE POSSESSION

Firearm, **State v. Taylor**, 448.

CONTRIBUTORY NEGLIGENCE

Known danger, **Kelly v. Regency Ctrs. Corp.**, 339.

CONVERSION

Compensatory and punitive damages, **Mace v. Pyatt**, 245.

CORPORATIONS

Fiduciary duty, **Marzec v. Nye**, 88.

Judicial dissolution, **Marzec v. Nye**, 88.

CORROBORATION

Police report, **State v. Johnson**, 718.

CRIMINAL LAW

Defendant's right to testify, **State v. Haymond**, 151.

CRIMINAL LAW—Continued

Plain view doctrine, **State v. Haymond**, 151.

Sufficient probable cause, **State v. Haymond**, 151.

CUSTODIAL INTERROGATION

Officer's unarticulated intent, **State v. Little**, 684.

DEBTORS

Designation of exempt property, **Brock & Scott Holdings, Inc. v. Stone**, 135.

DECLARATORY JUDGMENTS

Certificate of need required, **Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs.**, 276.

CON law, **Hope—A Women's Cancer Ctr., P.A. v. State of N.C.**, 593.

Ongoing certiorari proceeding, **Cary Creek Ltd. P'ship v. Town of Cary**, 99.

DIVORCE

Alimony order pending during equitable distribution claim, **Musick v. Musick**, 368.

Failure to reply to counterclaim not deemed as admission, **Crowley v. Crowley**, 299.

DOUBLE JEOPARDY

Second-degree murder and driving while impaired, **State v. Armstrong**, 399.

DRIVER'S LICENSE CHECKPOINT

Driving while impaired, **State v. Jarrett**, 675.

DRIVING WHILE IMPAIRED

Driver's license checkpoint, **State v. Jarrett**, 675.

Motion to suppress evidence, **State v. Jarrett**, 675.

**DRIVING WHILE LICENSE
REVOKED**

Instruction, **State v. Armstrong, 399.**

Motion to dismiss improperly allowed,
State v. Graves, 123.

DRUG TEST

Exclusion of victim's prior failure, **State
v. McCravey, 627.**

DRUGS

Motion to suppress, **State v. McRae,
319.**

Two controlled substances contained in a
single pill, **State v. Hall, 712.**

**EFFECTIVE ASSISTANCE OF
COUNSEL**

Claim dismissed without prejudice to
seek motion for appropriate relief,
State v. Johnson, 718.

Failure to file motion to dismiss, **In re
K.J.D., 653.**

No reasonable probability of different
outcome, **State v. Wilson, 110.**

EVIDENCE

Plain error, **State v. Samuel, 610.**

Unfairly prejudicial, **State v. McCravey,
627.**

EXEMPT PROPERTY

Modification of designation, **Brock &
Scott Holdings, Inc. v. Stone, 135.**

EXPERT TESTIMONY

No notice in discovery, **State v.
Armstrong, 399.**

**FELONY SPEEDING TO ELUDE
ARREST**

Pattern jury instruction, **State v.
Graves, 123.**

GOVERNMENTAL IMMUNITY

Public duty doctrine, **Scott v. City of
Charlotte, 460.**

GUILTY PLEA

Alford or no contest, **State v. Chery,
310.**

Motion to withdraw, **State v. Chery, 310.**

GUNS

Plain error to admit, **State v. Samuel,
610.**

HABITUAL FELON

Date of prior felony not essential element
of indictment, **State v. Taylor, 448.**

Indictment corrected, **State v. Hager,
704.**

HOMICIDE

Jury instructions in first-degree murder
case, **State v. Clodfelter, 60.**

Merger of robbery and murder convic-
tions, **State v. Curry, 375.**

INDICTMENT

Motion to amend, **State v. Taylor, 448.**

Variance, **State v. Taylor, 448.**

INSURANCE

Duty to defend, **Huber Engineered
Woods, LLC, v. Canal Ins. Co., 1.**

Statewide increase in homeowners'
rates, **State ex rel. Comm'r of Ins.
v. Dare Cnty., 556.**

INTERLOCUTORY ORDER

Alimony order pending during equitable
distribution claim, **Musick v.
Musick, 368.**

Failure to show substantial right,
Musick v. Musick, 368.

INVERSE CONDEMNATION

Riparian buffer ordinance, **Cary Creek
Ltd. P'ship v. Town of Cary, 99.**

Summary judgment proper, **First Gaston
Bank of N.C. v. City of Hickory,
195.**

JURY

Independent Internet research, **State v. Armstrong**, 399.

LARCENY

Property pawned, **State v. Hager**, 704.

**MANUFACTURING
METHAMPHETAMINE**

Intent to distribute not a necessary element, **State v. Hinson**, 172.

MEDICAID

Resource limits, **Cloninger v. N.C. Dep't of Health & Human Servs.**, 345.

MEDICAL EXAMINER

Immunity, **Green v. Kearney**, 260.

MEDICAL MALPRACTICE

Motion for a new trial improperly granted, **Langwell v. Albemarle Family Practice, PLLC**, 666.

METHAMPHETAMINE

Precursor chemicals, **State v. Hinson**, 172.

MIRANDA WARNINGS

Unsolicited and spontaneous statement, **In re D.L.D.**, 434.

NEGLIGENCE

Rule 9(j) certification not required, **Allen v. Cnty. of Granville**, 365.

NO CONTEST PLEA

Motion to withdraw, **State v. Chery**, 310.

OFFER OF PROOF

Failure to make, **State v. McCravey**, 627.

POLICE REPORT

Corroboration, **State v. Johnson**, 718.

POSSESSION OF COCAINE

Motion to dismiss, **State v. Johnson**, 718.

**POSSESSION OF FIREARM BY
FELON**

Constructive possession, **State v. Taylor**, 448.

Date of prior felony not essential element of indictment, **State v. Taylor**, 448.

**POSSESSION OF STOLEN
PROPERTY**

Shotgun hidden in closet, **State v. Wilson**, 547.

PREMISES LIABILITY

Contributory negligence, **Kelly v. Regency Ctrs. Corp.**, 339.

Known danger, **Kelly v. Regency Ctrs. Corp.**, 339.

PRESERVATION OF ISSUES

Trial court did not rule on motion, **State v. Hall**, 712; **Pay Tel Commc'ns, Inc. v. Caldwell Cnty.**, 692.

PRIOR RECORD LEVELS

Use of prior convictions, **State v. Hager**, 704.

PRIOR RECORD POINTS

Out-of-state conviction, **State v. Armstrong**, 399.

PROBABLE CAUSE

Staleness of evidence, **State v. Hinson**, 172.

PUBLIC RECORDS

Trial preparation materials, **Wallace Farm, Inc. v. City of Charlotte**, 144.

PUNITIVE DAMAGES

Willful and wanton conduct, **Mace v. Pyatt**, 245.

QUANTUM MERUIT

No recovery for grading work for unlicensed contractor, **Lato Holdings, LLC v. Bank of N.C.**, 332.

REASONABLE DOUBT

Deviation from pattern jury instruction, **State v. Graves**, 123.

REASONABLE SUSPICION

Informant tip, **State v. McRae**, 319.

Traffic violation, **State v. McRae**, 319.

RESENTENCING

Greater severity, **State v. Daniels**, 350.

RIGHT TO CONFRONT WITNESSES

Reporting lab results, **State v. Brennan**, 698.

ROBBERY

Plain error to admit guns, **State v. Samuel**, 610.

RULE 9(j) CERTIFICATION

Not required for ordinary negligence, **Allen v. Cnty. of Granville**, 365.

RULE 9(j) STATEMENT

Not supported by facts, **Campbell v. Duke Univ. Health Sys., Inc.**, 37.

SATELLITE-BASED MONITORING

Aggravated offense, **State v. McCravey**, 627.

Erroneous determination of aggravated offenses, **State v. Phillips**, 326.

SEARCH AND SEIZURE

Outbuilding within curtilage, **State v. Hagin**, 561.

Reasonable suspicion, **State v. McRae**, 319.

Scope of consent, **State v. Hagin**, 561.

Search of student reasonable, **In re D.L.D.**, 434.

SELF-DEFENSE

Imperfect, **State v. Cruz**, 230.

SENTENCING

Consecutive sentences not grossly disproportionate, **State v. Espinoza-Valenzuela**, 485.

Possession of two controlled substances in a single pill, **State v. Hall**, 712.

Sentence impermissibly based on defendant's insistence on jury trial, **State v. Haymond**, 151.

SEX OFFENDER REGISTRATION

Failure to verify address, **State v. Braswell**, 736.

SEXUAL OFFENDERS

Failure to verify address, **State v. Braswell**, 736.

STATUTE OF LIMITATIONS

Childhood vaccine-related injury compensation, **Goetz v. N.C. Dep't of Health & Human Servs.**, 421.

Untimely federal claim barred state claim, **Goetz v. N.C. Dep't of Health & Human Servs.**, 421.

STAY OF PROCEEDINGS

Denial not an abuse of discretion, **Muter v. Muter**, 129.

STORAGE OF STOLEN MOTORCYCLES

Fees, **Bowles Auto., Inc. v. N.C. Div. of Motor Vehicles**, 19.

SUBJECT MATTER JURISDICTION

Controversy not ripe, **Cary Creek Ltd. P'ship v. Town of Cary**, 99.

SUDDEN INCAPACITATION

Evidence sufficient, **Henry v. Knudsen**, 510.

TERMINATION OF PARENTAL RIGHTS

Late service of notice harmless error, **In re T.D.W.**, 539.

Timeliness of hearing, **In re T.D.W.**, 539.

Standing of licensed child-placing agency, **In re A.C.V.**, 473.

TRUSTS

Accounting information reasonably necessary to enforce rights, **Wilson v. Wilson**, 45.

Distribution of assets, **First Charter Bank v. Am. Children's Home**, 574.

Virtual Representation, **First Charter Bank v. Am. Children's Home**, 574.

TWO DISMISSAL RULE

Defendant not served in either prior suit, **Dunton v. Ayscue**, 356.

UNFAIR TRADE PRACTICES

Summary judgment, **Ahmadi v. Triangle Rent A Car, Inc.**, 360.

VALUATION

Fair market value, **Brock & Scott Holdings, Inc. v. Stone**, 135.

VARIANCE FROM INDICTMENT

Prior bad acts, **State v. Hager**, 704.

VENUE

Motion to change, **Caldwell v. Smith**, 725; **Pay Tel Commc'ns, Inc. v. Caldwell Cnty.**, 692.

WARRANT

Probable cause, **State v. Hinson**, 172.

WORKERS' COMPENSATION

Accident not arising out of employment, **Watkins v. Trogdon Masonry, Inc.**, 289.

Achilles tendon injury, **Gray v. RDU Airport Auth.**, 521.

Injury by accident, **Gray v. RDU Airport Auth.**, 521.

WRONGFUL TERMINATION

Reporting misconduct, **Combs v. City Elec. Supply Co.**, 75.

ZONING

Riparian buffer ordinance, **Cary Creek Ltd. P'ship v. Town of Cary**, 99.